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Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C.



ORIGINAL

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In Re: : Docket No.
: 15-CRB-0001-WR
Determination of Royalty : (2016-2020)
Rates and Terms for : Volume 23-PUBLIC
Ephemeral Recording and : Pages 6254-6274
Digital Performance of : Pages 6295-6401
Sound Recordings (Web IV) : Pages 6486-6503
-----:

PUBLIC SESSION

Washington, D.C.

Thursday, May 28, 2015

The hearing in the above-entitled matter
was convened at 9:09 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

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1 P R O C E E D I N G S

2
3 (PUBLIC SESSION)

4 CHIEF JUDGE BARNETT: Good morning.
5 Please be seated.

6 Counsel for SoundExchange and everyone,
7 we have admitted some paper documents subject to
8 identification on the disks in native format, the
9 whole of the transaction in documents. I think
10 those are 86 and 87, those disks?

11 MS. WHITTLE: 80 and 87.

12 CHIEF JUDGE BARNETT: 80 and 87. My
13 impression, and you can correct me if it's the
14 wrong impression, my impression is that those disks
15 contain a lot of material, not all of which will be
16 part of an admitted exhibit; is that correct?

17 MR. POMERANTZ: Ms. Ehler is not here,
18 so I'll do my best. I believe everything in there
19 is to be admitted. It is -- these are various
20 documents that are related to the agreements that
21 are -- that have been discussed, and I believe
22 they've been reviewed by all of the parties here,
23 and a narrower subset was included on the disks
24 that had been submitted. I can confirm that with
25 Ms. Ehler when I speak to her, but I believe

1 everything on those disks was supposed to be
2 submitted.

3 CHIEF JUDGE BARNETT: Okay. So you
4 have submitted replacement disks at this point that
5 are edited?

6 MR. POMERANTZ: Correct.

7 CHIEF JUDGE BARNETT: That's all we
8 needed to know.

9 MR. POMERANTZ: Correct.

10 CHIEF JUDGE BARNETT: We didn't have to
11 want to weigh through a bunch of bits and bites and
12 not know what they were.

13 MR. POMERANTZ: I think earlier this
14 week, we handed some disks to Ms. Whittle, and it
15 is those disk that are the replacement disks.

16 CHIEF JUDGE BARNETT: Right. Thank
17 you.

18 Mr. Malone.

19 MR. MALONE: Good morning.

20 CHIEF JUDGE BARNETT: Good morning.

21 MR. MALONE: I call Captain Kass.

22 CHIEF JUDGE BARNETT: All right.

23 MR. MALONE: The witness book, Your
24 Honor, is the one that I distributed with Mr.
25 Papish when he was here and I think there are

1 enough copies that we can provide duplicates.

2 CHIEF JUDGE BARNETT: Okay. Good.

3 Thank you. I have already taken mine into the
4 other space.

5 MR. MALONE: Val, the bench needs
6 copies.

7 CHIEF JUDGE BARNETT: That's okay. I
8 just offloaded a bunch of things.

9 I'm sorry, sir, could you please stand
10 and raise your right hand.

11 FREDERICK J. KASS, JR.,
12 being first duly sworn, to tell the truth, the
13 whole truth and nothing but the truth, testified as
14 follows:

15 DIRECT EXAMINATION BY COUNSEL FOR INTERCOLLEGIATE
16 BROADCASTING SYSTEM AND HARVARD RADIO

17 BY MR. MALONE:

18 Q. Will you state your name for the
19 record, please.

20 A. Frederick J. Kass, Jr.

21 Q. And where is your residence?

22 A. New Windsor, New York.

23 Q. Which is just south of Newburgh?

24 A. Just north of U.S. Military Academy at
25 West Point.

1 Q. All right.

2 CHIEF JUDGE BARNETT: I'm sorry, Mr.
3 Kass, just for the record, can you spell your last
4 name, please.

5 THE WITNESS: Yes. Kilo Alpha Sierra
6 Sierra.

7 CHIEF JUDGE BARNETT: Thank you.

8 BY MR. MALONE:

9 Q. I have just handed you a statement
10 which is marked by the Court as IBS Exhibit 9000.
11 Would you look at that and identify it, please.

12 A. Yes. It's my testimony -- my written
13 testimony on behalf of the Intercollegiate
14 Broadcasting System.

15 Q. On the last page, is that your
16 signature?

17 A. Yes.

18 Q. And is the -- the statements of fact in
19 the written testimony currently true and correct?

20 A. Yes.

21 Q. What is your relationship to the
22 Intercollegiate Broadcasting System?

23 A. I'm the current chief executive
24 officer, volunteer chief executive officer and
25 treasurer.

1 Q. And does the Intercollegiate
2 Broadcasting System have any employees?

3 A. No one is paid. We are all volunteers.

4 Q. And what was your first association
5 with college radio?

6 A. When I was 17, a freshman at Lehigh
7 University, 1960, I was manager of the radio
8 station, became interested in IBS, and have
9 basically been with them ever since.

10 Q. And would you briefly canvas your
11 military career?

12 A. I retired navy captain, 30 years of
13 service, multiple combat tours in Vietnam and
14 Desert Storm. I guess that's --

15 Q. All right.

16 A. I served from -- I was commissioned in
17 1964 and I retired in 1996.

18 Q. And do you have a relationship with a
19 military entity of the New York State?

20 A. I do. Governor Mario Cuomo, when I
21 retired from active federal duty appointed me as
22 the commander of the New York State Naval Militia,
23 which is the state duty, the Navy, Marine Corps and
24 Coast Guard.

25 Q. What is the composition of the

1 Intercollegiate Broadcast System?

2 A. Approximately 800 high school,
3 community college, state college and universities,
4 the vast majority of which are public entities of
5 our 50 states.

6 Q. And are these all homogenous or are
7 there various types of student station members?

8 A. They are dramatically different from
9 the smallest, which would be the high school
10 stations and the community college stations. They
11 have no dormitories. They are not a residential
12 activity, so they have very limited broadcasting
13 activities to the state colleges and then the major
14 universities which might have 40 or 50,000
15 students. Essentially all of the students, because
16 these are student radio stations, literally exist
17 for the progress of science and musical arts. They
18 are trying to build skill sets up, and they use the
19 radio station as -- much like a science lab, a
20 physics lab or a chem lab. It is a communications
21 room.

22 Q. To what extent are the students paid?

23 A. They are all volunteer.

24 CHIEF JUDGE BARNETT: Excuse me. Mr.
25 Kass, you indicated that a vast majority of the

1 members are public entities. Do you have a
2 breakdown of percentage or numbers on how many are
3 public and how many are private?

4 THE WITNESS: It is roughly 80 percent
5 public and 15 percent private, to the extent that
6 Harvard University is -- or Harvard College is
7 private, and then about five percent are
8 community-based, that necessarily -- they are not
9 necessarily financed by an entity of the state.
10 They are financed by the community.

11 CHIEF JUDGE BARNETT: Thank you.

12 THE WITNESS: You're welcome.

13 BY MR. MALONE:

14 Q. And are some of these stations
15 extracurricular activities?

16 A. Yes, most of them are.

17 Q. And is there a problem with the
18 stations paying money to SoundExchange, those that
19 are state institutions?

20 A. Yes, many of the 50 states have a rule
21 that the state taxpayer money cannot be paid for
22 lobbying or a lobbying group and SoundExchange uses
23 some of their money for lobbying.

24 Q. Would you elaborate, please, on the
25 activities that member stations participate in with

1 respect to IBS?

2 A. Absolutely. IBS is basically 75 years
3 of best management practices and what have you.
4 The way we communicate those practices to our
5 members are coast to coast conferences in the fall,
6 which are held at IBS member colleges and
7 universities. We have a major conference in New
8 York City in March. In addition to that, the best
9 way to learn is to have fun and be incentivized, so
10 we have an extensive rewards program and that --
11 there is over 4,000 entries into that and the
12 students are very anxious to win those awards.

13 Q. By entires, you mean programs?

14 A. Yes. Best sports program at the
15 University of Connecticut for women's basketball.

16 Q. And a volunteer member of the staff
17 listens to all 4,000 of these?

18 A. We have about 200 volunteers and the
19 judges tend to be radio professionals that also
20 speak at our conference. We have roughly 200
21 government and radio professionals and on occasion,
22 SoundExchange people.

23 Q. Going back to the classifications, if
24 you will, or types of stations, to what extent do
25 they differ in terms of the number of hours of

1 operation per channel?

2 A. The smaller stations, that would be the
3 high school stations and the community college
4 stations are on the air, so to speak, roughly three
5 hours a day, five days a week, 15 hours a week, and
6 they have about a 39-week year with vacations and
7 spring break, et cetera, so they are putting it in
8 terms of ATH or average tuning hours, they are on
9 the air about 1,755 hours a year.

10 MR. CHOUDHURY: Your Honor, this is
11 beyond the scope. There are no numbers of ATH or
12 estimates in his testimony.

13 MR. MALONE: Well, if Your Honor
14 please, he is describing the membership composition
15 of IBS and as he has laid the foundation by saying
16 there are different types, his testimony in total
17 will describe, for the bench, the types of stations
18 that are members of IBS. This is how the 800
19 members of his testimony refers to breakdown.

20 CHIEF JUDGE BARNETT: Sustained.

21 JUDGE FEDER: Mr. Malone, can you pull
22 the microphone a little closer to you.

23 MR. MALONE: I'm sorry.

24 BY MR. MALONE:

25 Q. I am going to hand you a document

1 marked IBS Exhibit No. 9001, which in the witness
2 binder is Tab 4, and would you identify that,
3 please.

4 A. Yes, this is IBS comments on
5 SoundExchange and CPI joint rate proposal.

6 Q. And again, going to the last page, is
7 that your signature?

8 A. Yes, it is.

9 MR. CHOUDHURY: Your Honor, we object
10 to questions and the admission of this exhibit. We
11 understand these comments are part of the overall
12 record in the proceeding, but there is nothing in
13 the testimony about this document.

14 MR. MALONE: If Your Honor please, the
15 sequence of events here is that CBI joined in a
16 motion to adopt certain regulations that they
17 agreed upon with SoundExchange. That was filed,
18 and we opposed that, and in the comments we filed,
19 you will note that the -- on information and
20 belief, we indicated that the -- there were some
21 problems with the bona fides of the agreement
22 because of some side payments.

23 SoundExchange -- I'm sorry, CBI filed
24 written testimony. We filed interrogatories and
25 document production requests which were denied, and

1 so SoundExchange -- or I'm sorry, CBI did not offer
2 a witness in this proceeding so that is certainly
3 not supported by testimony, and I think our
4 position would be that the proposal is -- you know,
5 what's sauce for the goose is sauce for the gander.

6 And if our opposition is going to be
7 not admitted, then we don't think that there is any
8 evidence in the record that supports the agreement
9 between SoundExchange and CBI, and so I think the
10 consequences of excluding our opposition would also
11 have the effect of excluding any affirmative
12 showing by CBI, and without that, I don't think
13 there is any record support for the CBI proposal.

14 CHIEF JUDGE BARNETT: Mr. Choudhury?

15 MR. MALONE: Briefly, we don't think
16 this situation is any different than the situation
17 with Mr. Papish, and in fact, in this situation,
18 there was certainly opportunity to file rebuttal
19 testimony in this proceeding and that was not filed
20 by IBS in this proceeding, and of course, this
21 document is part of the record with all of the
22 comments that were filed about the settlement which
23 were not just from IBS but with respect to the fact
24 record and the testimony of this witness which
25 should be restricted to his written direct

1 testimony, we don't think there is anything that
2 addresses that here.

3 CHIEF JUDGE BARNETT: Mr. Malone, the
4 proposed settlement between SoundExchange and CBI
5 was published, as you are well aware. We did
6 receive comments on that. Those comments are part
7 of the overall record. They relate solely to the
8 CBI settlement and our -- while that is not
9 unrelated to what we are doing here, our
10 consideration of those comments will be done in the
11 context of that settlement.

12 MR. MALONE: Well, if Your Honor
13 please, that's -- however the bench wants to deal
14 with that is fine. I do think that there are
15 serious allegations which are unrebutted on paper
16 or in live testimony, and we will stand on the
17 record as you have it.

18 CHIEF JUDGE BARNETT: Okay. Thank you.

19 MR. MALONE: I think that concludes my
20 questions, Mr. Kass.

21 JUDGE FEDER: Mr. Malone, did you
22 intend to offer the written testimony?

23 MR. MALONE: I'm sorry, Your Honor, I
24 neglected to do that. Thank you.

25 We offer Exhibit 9000.

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1 CHIEF JUDGE BARNETT: Is Exhibit 9004
2 his testimony?

3 MS. WHITTLE: 9000 is the written
4 testimony of Mr. Kass.

5 CHIEF JUDGE BARNETT: 9000, oh, I
6 thought it was 9004.

7 MR. MALONE: No, we are not that
8 prolific.

9 CHIEF JUDGE BARNETT: Any objection to
10 Exhibit 9000?

11 MR. CHOUDHURY: No objection.

12 CHIEF JUDGE BARNETT: Exhibit 9000 is
13 admitted. Thank you, Mr. Malone.

14 (IBS Exhibit No. 9000 was admitted into
15 evidence.)

16 CHIEF JUDGE BARNETT: Mr. Kass, you
17 might have some more questions to answer, so we're
18 not going to let you off the hook that easy.

19 CROSS-EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

20 BY MR. CHOUDHURY:

21 Q. I will let you off the hook pretty
22 easy. Thank you for your patience in waiting with
23 us for your testimony.

24 As you know, my name is Anjan Choudhury
25 and I represent SoundExchange. Just a couple of

1 questions.

2 There are members of IBS who don't
3 Webcast, correct?

4 A. Yes.

5 Q. And do you know what percentage of your
6 total membership engaging in Webcasting?

7 A. No.

8 Q. Do you know how many -- well, let me
9 ask you: You know, in your testimony, you referred
10 to the state laws.

11 Do you recall what --

12 A. Yes.

13 Q. Can you identify an example of one of
14 those state laws?

15 A. By chapter and verse? I mean, New York
16 State, for instance, which I am a citizen of, has a
17 statute -- actually numerous statutes which say
18 that New York State taxpayer money may not be used
19 for -- to pay a lobbyist or lobbying organizations.

20 Q. And what you mean by that, is that
21 those laws mean that you can't donate, for example,
22 to a lobbying organization, correct?

23 A. No. It means that you can't use state
24 taxpayer money to pay an organization that lobbies.

25 Q. Would you agree that state taxpayer

1 organizations, like IBS members, they pay
2 electricity bills, correct?

3 A. Typically, no. They are provided free
4 by the university.

5 Q. So it's your testimony that under your
6 understanding of the laws, that state organizations
7 cannot pay any bills for any organization that has
8 a lobbying component to it?

9 A. Correct.

10 Q. And you are not a lawyer, correct?

11 A. Absolutely not.

12 MR. CHOUDHURY: Thank you. That is
13 all.

14 CHIEF JUDGE BARNETT: Any further
15 questions from anyone?

16 Thank you very much, Mr. Kass.

17 THE WITNESS: Thank you, Your Honor.

18 (Witness excused.)

19 MR. POMERANTZ: Your Honor,
20 SoundExchange calls Professor Daniel Rubinfeld as
21 our next witness.

22 CHIEF JUDGE BARNETT: Professor
23 Rubinfeld, you remain under oath, so you may be
24 seated.

25 DANIEL L. RUBINFELD,

1 having been previously duly sworn, to tell the
2 truth, the whole truth and nothing but the truth,
3 testified as follows:

4 MR. POMERANTZ: Just so everybody has
5 what they should have, there should be two binders,
6 the first of which I believe is just his direct and
7 rebuttal testimony with exhibits, and the second is
8 some other documents we may refer to during the
9 course of the examination. I believe inside the
10 pocket part of the -- maybe the first binder will
11 be some demonstrative slides that we will be going
12 through.

13 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

14 BY MR. POMERANTZ:

15 Q. Good morning, Professor Rubinfeld.

16 A. Good morning.

17 Q. I remind you that you are still under
18 oath.

19 A. I am.

20 Q. So we are here today to discuss your
21 written rebuttal testimony and, in particular,
22 we're going to address just a few of the topics
23 that you raised there.

24 Let's look at the first slide. If you
25 could tell the judges what topics we will be

1 addressing this morning.

2 A. Sure. I will be commenting on some
3 aspects of the iHeart-Warner deal as a possible
4 benchmark, and then I'll also talk about the
5 Pandora-Merlin deal, and then I want to make a few
6 responses to some of the critiques of the
7 interactivity adjustment that I used to go from the
8 interactive services to get a benchmark with
9 respect to noninteractives.

10 Q. Right.

11 MR. POMERANTZ: So, Your Honor, the
12 first topic, the iHeart-Warner topic, will be
13 confidential. One small portion of the
14 Pandora-Merlin will also be confidential. The rest
15 will be open.

16 So I think if we can start with it
17 closed and then we'll bring everybody back.

18 CHIEF JUDGE BARNETT: Thank you.
19 Anyone in the courtroom who has not signed the
20 nondisclosure certificate, please wait outside.

21 (THIS ENDS PUBLIC SESSION)

22 (RESTRICTED SESSION BOUND SEPARATELY)

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Capital Reporting Company
Day 23 In Re: Determination of Royalty Rates (Public) 02-28-2015

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1 (THIS BEGINS PUBLIC SESSION)

2 BY MR. POMERANTZ:

3 Q. Now, Professor Rubinfeld, if we could
4 turn back to Slide 12.

5 Is this a summary of the points you
6 want to address today relating to Pandora-Merlin?

7 A. Yes.

8 Q. Let's go to the first point, which I
9 think is described on tab -- on Slide 13.

10 Could you just walk the judges through
11 your views about the effects of the shadow of the
12 statutory license on the Pandora-Merlin deal?

13 A. Yes. My view is that this deal, like
14 the iHeart deal is -- was affected by the shadow of
15 the statutory license. There is just no way to
16 avoid that.

17 In this particular case, you see the
18 effect of the shadow because the headline rate on
19 the deal was essentially a mirror of the Pureplay
20 rates, and so everyone knew when the deal was being
21 negotiated that Pandora had the option to take --
22 to accept the Pureplay rates and enter into this
23 deal, but it is very hard for me to see why the
24 shadow wouldn't have a big effect on the
25 negotiations, and the deal ends on the last day of

1 the rate period. Everything fits very closely to
2 the Pureplay settlement itself.

3 Q. And then if we could go to the next
4 slide, Slide 14.

5 Could you explain to the judges your
6 views as to whether the Pandora-Merlin deal is
7 representative as -- for purposes of benchmark
8 considerations?

9 A. Sure. As I think I expressed in my
10 original testimony, I would be very concerned
11 myself without relying on a single agreement in
12 order to reach a decision about what the
13 appropriate rate setting ought to be, and that is
14 particularly true because the agreement was one
15 that was affected by the shadow.

16 This particular agreement with Merlin
17 involves -- does not involve any of the three
18 majors and Merlin is a significant player, but they
19 have less than five percent of all the performances
20 on Pandora. So you have to be careful about what
21 inferences you draw from that size sample, if you
22 will. And so there is no agreement. If there were
23 other agreements that Pandora had with the majors,
24 that would add more information. It would still
25 suffer from the shadow problem, but at least

1 provide more information so I would just be very
2 nervous about drawing any simple conclusion just
3 from the Merlin agreement.

4 JUDGE STRICKLER: Question for you,
5 Professor Rubinfeld: I just want to get a sense of
6 how many contracts you looked at, separate and
7 apart from market share, which is a different
8 issue, versus the number of contracts that were
9 looked at by the services, how many contract pairs
10 did you look at to reach your estimate of -- for
11 proposed rates?

12 THE WITNESS: Well, I looked at over 80
13 -- on the interactive side, over 80 contracts, 60
14 of which had data on play rates that I used in the
15 calculations, so the actual calculations had about
16 60 contracts.

17 JUDGE STRICKLER: So 60, and
18 iHeart-Warner, if we're just keeping score -- and
19 again, in this regard and no other way, just so I
20 get a sense of this aspect of it, they relied on --
21 they have 28 agreements that they had proposed. I
22 understand you may have criticisms of a number of
23 them, but I believe they have 28; is that right?

24 THE WITNESS: There are a lot of --
25 yeah, I think there are 27 agreements with indies,

1 that's correct.

2 JUDGE STRICKLER: Plus the
3 iHeart-Warner makes 28.

4 THE WITNESS: Right.

5 JUDGE STRICKLER: And then we have the
6 Pandora-Merlin agreement. Would you consider the
7 Pandora-Merlin agreement one separate agreement or
8 does it constitute -- each time one of the Merlin
9 entities opts in, it constitutes a separate
10 agreement between -- from an economic point of
11 view, between that entity that opted in and
12 Pandora?

13 THE WITNESS: I think of it as just one
14 agreement because everyone who opts in is opting in
15 to exactly the same terms, so I think it is -- for
16 me, it is more proper to say one agreement that
17 affects let's say up to five percent of the market.

18 JUDGE STRICKLER: But I understand the
19 market is a different issue.

20 THE WITNESS: Right.

21 JUDGE STRICKLER: I am purposely
22 holding that aside and asking the question.

23 So you looked at about 60 agreements
24 and the services in that regard looked at
25 approximately 29 agreements; is that right?

1 THE WITNESS: Yes. But I think that is
2 correct, but it's important for me to see what kind
3 of variation there is in the agreements, the more
4 there is variation, the more information you get
5 about how different circumstances might affect the
6 agreement, so I think you're going to see -- if you
7 look at the indie agreements, you are not going to
8 see the kind of variation you'd see when you look
9 at all the interactive agreements.

10 JUDGE STRICKLER: Could that be because
11 the indies are more in the nature of price-takers?

12 THE WITNESS: Yes.

13 JUDGE STRICKLER: And the majors have
14 sufficient market power to not be mere
15 price-takers?

16 THE WITNESS: I think that is part of
17 it, yes. There's more -- both -- I think both
18 sides have some power but I think -- as I've
19 expressed in other ways, the majors do have
20 substantial bargaining power and that puts them in
21 a different position, but the fact is that when I
22 looked at the roughly 60 deals that had per-play
23 rates, I saw a significant variation so the
24 bargains are going on there were somewhat distinct.

25 JUDGE STRICKLER: Leaving the

1 variations aside for a moment -- I don't mean to
2 minimize the importance of it, but just leave it
3 aside and leave the market share aside that's
4 represented by these agreements -- again, not
5 intending to minimize the importance of that, what
6 import, if any, do you put on the fact that you
7 looked at 60 agreements versus the fact that the
8 services looked at 29 agreements?

9 THE WITNESS: It's not -- I do think
10 the 60 are substantially more informative than 29,
11 but it's not just by counting contracts.

12 JUDGE STRICKLER: That's my point.
13 That's why I was holding the other things aside.
14 So I hold them constant, if you will. Just -- so
15 if I understand correctly, it's not the mere fact
16 that you looked at 60 and they looked at 29, it's
17 the information you can glean from the agreements
18 that makes them relevant if the 60 were less
19 informative than the 29. And I'm not saying that's
20 your testimony. But if the 60 were less
21 informative than the 29, then the 29 would be more
22 pertinent to setting the rate, if that were the
23 case?

24 THE WITNESS: Yes, I agree. I agree
25 with that. And, for me, it's -- there's variation

1 in the 60 was important and also the fact that
2 their -- that the shadow effect was less
3 substantial because they were interactive and not
4 noninteractive agreements.

5 JUDGE STRICKLER: Thank you.

6 BY MR. POMERANTZ:

7 Q. All right. So let's turn to the next
8 slide, which is the steering provision.

9 A. (Witness complies.)

10 Q. And if you could discuss first the
11 first two bullet points and what your views are
12 about the steering provision?

13 A. Well, the first -- first point is that
14 one, I think that's been made before by others, but
15 if Pandora has made a promise to steer in favor of
16 Merlin you can't do that with respect to all of the
17 other record companies because the total volume of
18 sales is a hundred percent. If you are steering
19 against every one then you have more than a hundred
20 percent. So it's really an arithmetic point, but I
21 think it's an important point.

22 The second -- the second point is that
23 the statutory license is not going to have a
24 steering component to it. So it's a little hard
25 for me to know exactly what implications you're

1 going to draw from from steering, from the promise
2 of steering. Because you can't -- you're not going
3 to see it, ultimately, in the statutory license and
4 ultimately bargains are going to be bargains that
5 are made around the presence of the statutory
6 agreement.

7 Q. Now, Professor Shapiro has testified
8 that the threat of steering, alone, would lead to
9 lower rates from record companies.

10 What's your view of that opinion?

11 A. I -- I don't think it's likely to
12 happen because I don't think the threat is -- is a
13 credible threat would be the term we use in
14 economics, and the reason is -- the reason is that,
15 first of all, the record companies, as I have said
16 a number of times before, do have substantial
17 bargaining power and they have responses to the
18 threat that takes away its credibility. In the
19 rather strong version, they could -- they could
20 look to other sources of listeners and say we're
21 going to consider not using your service, but they
22 don't have to go that far. They could say we're
23 not going to -- to feature all of the same artists,
24 maybe we'll take some of our top artists off our
25 offerings, and we just -- we can vary what we do

1 for you, basically, as a service if you think
2 you're going to threaten us.

3 And so I think the fact that they do
4 have that kind of bargaining power is really going
5 to make a threat nonviable, noneffective. And I
6 haven't seen an example of a real threat. The
7 steering that we see in iHeart as part of the
8 negotiation, it was more of a carrot than a stick
9 and that I understand. I do understand that
10 steering can have an impact. We discussed that at
11 some length, but I don't think it's, alone, a
12 credible threat. So I don't think you would see
13 everyone negotiating an agreement to steering in
14 their contracts.

15 JUDGE STRICKLER: Professor, do you
16 think that the smaller independents have that same
17 bargaining power to make the -- to respond to the
18 threat of steering, as you just described it?

19 THE WITNESS: No, they wouldn't have.
20 They wouldn't have quite the same bargaining power,
21 that's quite right. I mean, I think it's more
22 likely if you're going to see steering at all, it
23 would be with some of the smaller players.

24 JUDGE STRICKLER: What do the
25 independents lack that the majors have that makes

1 the independents unable to exercise that threat?

2 THE WITNESS: Well, you know, there are
3 so many indies, so it's hard to say. But I assume,
4 typically, they're only going to have a few artists
5 that have really the name recognition and the power
6 to make a difference. So, you know, threatening to
7 remove, say, your top artist if you're one of the
8 major indies may not have the same -- it may not be
9 as credible because without that artist you may not
10 sell many records -- I mean -- sorry -- many songs
11 at all.

12 JUDGE STRICKLER: So if the record
13 company industry was more atomistic, the threat of
14 steering would be more credible, but because it's
15 not that atomistic to have market shares that show
16 some -- the level of concentration that exists, it
17 makes the ability of the majors to rebut the
18 threat, if you will, more likely to be successful?

19 THE WITNESS: I think that's true. You
20 know, we're in a world that is very far atomistic.
21 That's the world we've been in for a long time and
22 I think that does affect the points I've made. So
23 yes, I agree. Highly atomistic. I can imagine
24 steering having a bigger impact. I mean, that's a
25 harder world for me to imagine because I have been

1 in the world of seeing three or four more major
2 companies having a pretty big impact.

3 JUDGE STRICKLER: Thank you.

4 BY MR. POMERANTZ:

5 Q. All right. Let's go to the last topic
6 that you have said you wanted to address this
7 morning. It's on Slide 17. And you said you
8 wanted a response -- to respond to two different
9 critiques that you've seen and read about of your
10 interactivity adjustments. The first one you
11 describe as subscription versus ad supported. And
12 we've heard testimony from some of the other
13 economists who have testified that it's improper to
14 look at subscription prices for calculating an
15 interactivity adjustment because it ignores the
16 predominantly ad-supported model of noninteractive
17 services.

18 What's your response to this criticism?

19 MR. JOSEPH: Your Honor, I object to
20 these lines -- the witness fully addressed these in
21 his direct appearance. In fact, that was the
22 appropriate time to do so, at transcript 1831 to
23 32, and the second subject was 2026 to 2034. He
24 had an opportunity to respond to the rebuttals in
25 his direct and that was the scheme that the parties

1 agreed to.

2 MR. POMERANTZ: Your Honor, I actually
3 do agree that to some extent this testimony today
4 should be somewhat limited because of the fact that
5 he was here for a long time the last time. That
6 being said, this particular point he did address in
7 his rebuttal and there's been a lot of testimony
8 between when he was here the last time and today,
9 and I just wanted to give him an opportunity to
10 briefly respond to what the other experts have
11 said, which I think is appropriate in the rebuttal
12 phase of the case.

13 MR. JOSEPH: Your Honor, just one last
14 point. To the extent he addressed it in his
15 rebuttal, it was not proper in the rebuttal because
16 in the direct testimony of the experts they didn't
17 criticize his models for the interactive service.
18 They were talking about the past. So it was
19 improper rebuttal testimony to begin with.

20 MR. POMERANTZ: That's not true, and I
21 can explain to you why.

22 CHIEF JUDGE BARNETT: No.

23 I'm going to allow it. It's just so we
24 have all of our notes in one place on this topic.

25 Thank you, Mr. Pomerantz.

1 BY MR. POMERANTZ:

2 Q. Let me just restate the question, then.

3 We've heard testimony from some of the
4 other economists in this matter that it's improper
5 to look at subscription prices for calculating an
6 interactivity adjustment because it ignores the
7 predominantly ad-supported model of noninteractive
8 services.

9 What's your response to that criticism?

10 A. My response is that it's -- my goal was
11 to try to get as clean a calculation that accounted
12 for the different functionality between
13 subscription -- between interactive and
14 noninteractive services. And so looking, for
15 example, at subscriptions alone allows me to do
16 that. Looking at ad-supported services separately,
17 which I also did, gave me a relatively clean
18 exercise, but not as clean because the ad-supported
19 services do -- between interactive and
20 noninteractive do depend on different business
21 models, and that would affect the results to some
22 extent.

23 But calculations that cover all the
24 revenues like the -- one of the calculations that
25 Professor Lichtman put forward last week, to me,

1 are off base because they're mixing -- they're
2 mixing ad-supported and subscription services.
3 They're mixing different models. So they don't get
4 -- they don't form the real issue I wanted which is
5 how to separate out the different functionalities
6 in the two types of services.

7 Q. All right. And then the second
8 criticism that was raised by some of the economists
9 was that you have assumed that the ratio between
10 subscription prices and royalty rates would be the
11 same for noninteractive services as interactive
12 services, and they say that that assumption is
13 unreasonable.

14 How do you respond to that?

15 A. That is the assumption I spelled out,
16 and I do think it's reasonable and I can give you a
17 brief description of why I think it's reasonable.
18 This would be slightly technical, but I'll do my
19 best.

20 So, basically, in the world we're
21 talking about, the key input to producing music is
22 obviously recorded for music services, recorded
23 music itself. So we have that key input and that
24 key input drives the royalty rates. All the other
25 inputs are relatively modest in terms of the

1 variable costs. There may be very significant
2 fixed costs. The investments, for example, that
3 Pandora makes are very significant, but the actual
4 incremental costs are not very high.

5 And, furthermore, there's not likely to
6 be much substitution between the key input, which
7 is the music -- recorded music and the other inputs
8 that they're not very high to start with, and I
9 don't think there's much substitution. So if
10 you -- if you take that world and then you add to
11 it the fact that downstream, at least as I
12 testified and others have as well, there's
13 substantial competition among all the different
14 kinds of alternative retail services, both
15 interactive and noninteractive, which makes the
16 elasticity of demand quite high and likely, in my
17 view, given convergence, makes the elasticity of
18 demand for interactive services quite similar to
19 the elasticity for demand for noninteractive
20 services.

21 Now, if you take each of the components
22 I have talked about, the fact that music is the key
23 input, there's very little substitutability, and
24 the downstream elasticity of demands are relatively
25 similar for both interactive and noninteractive

1 services.

2 You can actually take the Hicks
3 Marshall relationship that a bunch of the experts
4 have talked about that explains how you get derived
5 demand and you can simplify it. And the way I
6 would simplify it intuitively would be to say let's
7 look downstream at the so-called Lerner condition,
8 which Professor Shapiro has referred to a number of
9 times and other experts have as well, and the
10 Lerner condition says that the markup of price over
11 cost is inversely related to the elasticity of
12 demand for that particular product.

13 So the markup over cost is the markup
14 over basically royalty because the royalty is the
15 main input in the music. And if the elasticity
16 demands are the same, then it's very easy to see if
17 you just look at the Lerner conditions that the
18 relationship between the royalties will be -- the
19 ratio of the price of the royalty will be the same
20 for both interactive and noninteractive services.
21 It follows directly by looking at two different
22 Lerner conditions, one for interactive and one for
23 noninteractive services. The subscription price
24 for the interactive is twice the subscription price
25 for the noninteractive. If you're going to have

1 Lerner conditions to be equal, the royalty has to
2 be twice as high.

3 So the assumption I made is an
4 assumption, but it's an assumption that, to me,
5 intuitively makes sense because it fits the
6 conditions that we learned about it that describe
7 the nature of competition in this industry.

8 MR. POMERANTZ: Your Honor, I have no
9 further questions at this time.

10 CHIEF JUDGE BARNETT: Thank you.

11 MR. JOSEPH: I'm sorry. Your Honor, at
12 the risk of trying the Court's patience, I move to
13 strike that last answer on the ground it goes far
14 beyond a simple response into what purports to
15 be -- probably is -- purports to be an analysis. I
16 don't know how we get that in and get no chance to
17 respond.

18 MR. POMERANTZ: Your Honor, that was
19 directly responsive to their rebuttal to Professor
20 Rubinfeld and all the facts he testified to are in
21 the record already.

22 CHIEF JUDGE BARNETT: I think it was
23 directly responsible -- or responsive, Mr. Joseph.
24 So we'll not strike it. Overruled.

25 MR. POMERANTZ: Thank you, Your Honor.

1 MR. RICH: Cross-examination, Your
2 Honor?

3 CHIEF JUDGE BARNETT: Yes. Let's
4 begin. We might have to break it with our break,
5 but...

6 MR. RICH: This can be in open session,
7 Your Honor. I think the entire examination can be
8 in open session.

9 CHIEF JUDGE BARNETT: Outstanding.

10 CROSS-EXAMINATION BY COUNSEL FOR PANDORA

11 BY MR. RICH:

12 Q. Good morning, Professor Rubinfeld.

13 A. Good morning.

14 Q. I would like to start by coming back to
15 the colloquy you had with Judge Strickler about the
16 relative numbers of contracts that have been drawn
17 from by the parties in crafting their benchmarks.

18 Do you remember that discussion?

19 A. Yes.

20 Q. I believe you testified, to the best of
21 your recollection, that you drew from about 60
22 agreements in framing your interactive services
23 benchmark?

24 A. Yes.

25 Q. If you would take the first of the two

1 binders that Mr. Pomerantz provided you, Mr.
2 Rubinfeld Direct Exhibit Volume I, and turn to Tab
3 20.

4 A. (Witness complies.)

5 Q. I believe it's labeled Exhibit 16-A to
6 your written direct testimony.

7 Do you see that?

8 A. Yes.

9 Q. Can you describe what's set forth on
10 that exhibit?

11 I don't mean numerically, but
12 functionally what is that exhibit doing?

13 A. This comes -- this comes from, I think,
14 my initial report, and I think I would want to look
15 at the report to put it in context. It describes a
16 range of adjusted interactive benchmark rates. I
17 don't recall the full context. If you need more I
18 need to go back and look at my report.

19 Q. Well, I'm not going to ask you, at this
20 late date, to refresh yourself about your report,
21 but is it accurate that this sets forth the
22 entities and license agreements from which you drew
23 data that you based your interactive rate
24 calculations on?

25 A. I believe that's correct.

1 Q. Now, if you look at the next to last
2 column, which is labeled "Adjusted Minimum Per-Play
3 Rate," do you see that?

4 A. Yes.

5 Q. Am I correct that it is from the data
6 listed in that column that you derived your
7 per-play rate from which your rate proposal derives
8 in this case?

9 A. I think that's likely correct, but I
10 need to go back and look at my report to be certain
11 of that. Give me just a minute.

12 Q. Sure.

13 A. I'm just having trouble.

14 Q. I'm advised that the reference may be
15 at Paragraph 227 of your written direct testimony.

16 A. Okay. Thank you.

17 Yeah. The reason I was hesitating is
18 because the paragraph you referred me to does
19 describe Exhibit 16 and I -- you showed me 16-A and
20 I just don't recall why there's a 16-A and --
21 rather than 16. I don't have any -- so there may
22 have been a distinction. I just don't recall what
23 made me refer to 16 in the text and this is 16-A.
24 I just don't remember the difference.

25 Q. I'm not sure we can solve that during

1 this colloquy, but let me ask you this: Focusing
2 on that next to last column and presuming for
3 purposes of this examination that the data depicted
4 in that column are the source for the rate proposal
5 you make respecting per-play rates as depicted at
6 Paragraph 227 and following the direct examination,
7 how many data points appear in that column?

8 A. Which column?

9 Q. The next to last column in Exhibit
10 16-A. How many data points did you draw from in
11 that next to the last column?

12 A. It's hard to --

13 Q. I count 26.

14 A. Yeah. I was going to say it's hard to
15 count exactly. I would say just under 30. So if
16 you tell me it's 26, that could be right.

17 Q. So not 60, correct?

18 A. Well, there were originally -- there
19 are not 60 in that column. There are originally
20 about 80 contracts, but they were not -- not all of
21 them had minimum per-play rates. Many of them had
22 other parts of the contract, but not minimum
23 per-play rates.

24 Q. So the record is clear, in deriving
25 what you call your minimum per-play rates that

1 forms the basis for your recommendations to these
2 judges, you drew data from 26, not 60 interactive
3 service agreements, correct?

4 A. I am not -- I gather your point, just
5 not a hundred percent sure this is the exact right
6 number, but -- because I'm not sure -- I just don't
7 recall why 16-A is different than 16, but if your
8 general point is that not all of the contracts have
9 minimum play rates, that's correct.

10 Q. That wasn't the general point. I ask
11 you simply to answer my question --

12 A. Well, I told you --

13 Q. -- whether you -- hold on. Whether you
14 can cite anything in any of your testimony, any of
15 your exhibits that would refute the proposition
16 that in calculating the recommended per-play rates
17 here you relied on exactly 26 interactive service
18 agreements. That's correct, isn't it?

19 That's a "yes" or "no."

20 A. No. I told you I'm not certain that
21 16-A rather than 16 reflects the correct number. I
22 certainly know that the number is less than a full
23 number of contracts I looked at, but I --

24 Q. Do you even know if you have an Exhibit
25 16 in your testimony, sir?

1 A. I told you I don't recall. I don't
2 have any recollection that I -- recollection at all
3 as to why this is 16-A.

4 Q. Now, in Paragraph 3 of your written
5 rebuttal testimony you state as to the
6 iHeart-Warner and Merlin-Pandora agreements that,
7 quote, "neither is informative," unquote.

8 Do you recall that testimony?

9 A. And where did you say, sir?

10 Q. Paragraph 3 of your written rebuttal
11 testimony.

12 A. Let me dig that out.

13 Yes.

14 Q. And, again, at Paragraph 74 of that
15 testimony you state that you find that the
16 Pandora-Merlin deal, quote, "to be uninformative as
17 a benchmark for this proceeding," unquote; is that
18 correct?

19 A. Yes.

20 Q. You actually don't believe that to be
21 the case, do you?

22 A. You will have to explain.

23 Q. You actually believe that the judge
24 should consider these benchmarks, don't you?

25 A. No, I believe -- well, one could

1 consider all the evidence, but I believe the right
2 way -- the best way to go at -- informing the issue
3 at hand is to focus on the interactive agreements
4 the way I have described.

5 Q. Do you recall at your deposition
6 indicating that you thought it was an unfortunate
7 choice of words on your part to call these
8 uninformative?

9 A. I may have said that, yes.

10 Q. Do you have a different view today?

11 A. Well, we've had -- the reason I -- I
12 probably said that would be -- was because we had
13 discussion about these agreements and the
14 agreements are part of the picture, and I think
15 it's reasonable to take them into account. So
16 maybe uninformed of saying we should literally
17 disregard them may be too strong a statement.

18 Q. You also characterize the
19 Merlin-Pandora, and iHeart-Warner agreements as,
20 quote, "atypical," unquote, don't you again in
21 Paragraph 3?

22 A. Yes.

23 Q. For reasons we'll discuss further; but
24 here, again, you wouldn't urge the judges to
25 totally disregard them on the basis of what you

1 term their atypical nature, would you?

2 A. I think they should be given, let's
3 say, very little weight, not just because they're
4 atypical, but because of the reasons I have stated
5 earlier today and earlier in my report. There are
6 specific reasons. The fact that they're negotiated
7 in the shadow of the current hearing as well as
8 the -- if we're talking about Merlin and the shadow
9 of the Pureplay rates.

10 Q. In Paragraph 71 of your written
11 rebuttal testimony, turn to that, please.

12 A. (Witness complies.)

13 CHIEF JUDGE BARNETT: This is the
14 restricted material?

15 MR. RICH: I think what I am citing --
16 thank you, Your Honor -- will not impinge on
17 restricted status.

18 THE WITNESS: I'm there.

19 BY MR. RICH:

20 Q. You further criticize the Merlin
21 agreement as quote, "a two-year trial license,"
22 unquote, that is, quote, "in sharp contrast to the
23 statutory licenses five-year term," unquote.

24 Do you see that?

25 A. Yes.

1 Q. But that description of the license as
2 a trial license is another one that you no longer
3 stand by; isn't that true?

4 A. I -- it sounds like you're recalling
5 something I said on a deposition, which I don't
6 actually recall.

7 Q. Do you believe sitting here today that
8 the Merlin license was accurately described as a
9 trial license?

10 A. Well, it's an agreement that was
11 actually reached and put in place, but I -- I
12 believe at the time I wrote this I viewed it as a
13 trial license because I believe that there was --
14 the thought was that if the license was successful
15 for both parties it would continue beyond the
16 two-year period.

17 Q. Does that make it distinguishable from
18 almost any other license in which parties,
19 depending on the success or lack of success of a
20 commercial agreement, will decide whether to carry
21 forward or continue or extend that agreement?

22 A. I think every license has to be treated
23 separately.

24 Q. And with respect to its two-year term,
25 please remind the judges of the average duration of

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1 the interactive services agreements in which you
2 rely for benchmarking?

3 A. I don't know the exact average, but
4 they're in the same ballpark.

5 JUDGE STRICKLER: Which same ballpark
6 is that?

7 THE WITNESS: Yeah, same ballpark,
8 through typically in the two-year range.

9 BY MR. RICH:

10 Q. Now, you'll recall that in your written
11 direct testimony you derived from the Web III
12 remand determination four economic tests to
13 evaluate potential benchmarks.

14 Do you recall that?

15 A. Yes.

16 Q. And at Page 14 of your written rebuttal
17 testimony you assert in the caption to the
18 succeeding section that the Merlin agreement quote,
19 "fails the judges' comparability test," unquote,
20 correct?

21 A. Where are you, sir?

22 Q. Page 14 of your written rebuttal
23 testimony.

24 CHIEF JUDGE BARNETT: Do you have a
25 paragraph number?

1 THE WITNESS: It's a heading, Your
2 Honor.

3 MR. RICH: It's a heading in Section B,
4 Your Honor.

5 CHIEF JUDGE BARNETT: Oh, thank you.

6 THE WITNESS: Heading 1 under Section
7 B, Your Honor.

8 BY MR. RICH:

9 Q. The Pandora-Merlin agreement fails the
10 judges' comparability test and is an inappropriate
11 benchmark."

12 Did I read that correctly?

13 A. You did.

14 Q. Now, let's examine that contention
15 against your chosen four economic tests. If we
16 could put up on the screen the text of Paragraph
17 122 from your written direct testimony, and I'll
18 represent to you and to the judges that that's an
19 actual transcription just blown up for convenience
20 of the text of your four economic tests.

21 Do you recognize those, sir?

22 MR. RICH: Why don't we hand the
23 witness a paper version of this if it will be
24 easier.

25 THE WITNESS: I do recognize it if that

1 helps.

2 BY MR. RICH:

3 Q. Okay. Let's go through these one by
4 one. Willing buyer and willing seller test. You
5 would agree, wouldn't you, that the Merlin-Pandora
6 agreement is the product of negotiations between a
7 willing buyer and willing seller?

8 A. Yes. My only concern would be whether
9 the hypothetical marketplace is affected by the
10 shadow of the existing agreements.

11 Q. Which you get to in Part C, correct?

12 A. I think the shadow affects the number
13 parts, not just Part C.

14 Q. You wouldn't dispute this agreement was
15 entered into between a willing buyer and a willing
16 seller, correct?

17 A. That's correct.

18 Q. Okay. So it doesn't flunk the first
19 test, right?

20 A. No, I don't think it flunks the test.

21 Q. Okay. Number 2 is same parties test,
22 do you see that?

23 A. Yes.

24 Q. Which you define as quote, "the buyers
25 in this hypothetical marketplace are the statutory

1 Webcasting services and the sellers are record
2 companies;" is that correct?

3 A. Yes.

4 Q. You would agree that the Merlin deal
5 was entered into between a statutory Webcasting
6 service and record companies, correct?

7 A. I would agree with that.

8 Q. So it doesn't flunk the second test
9 either, does it?

10 A. It does not, but the -- I was not
11 asking the question the way you described it is
12 whether one flunks a test or not. The question is
13 how relevant the test is in forming the ultimate
14 question as to whether something is a good
15 benchmark. So, certainly, B set -- both parties
16 satisfied B. A, I would say I have issues with for
17 reasons I described.

18 Q. Okay. Let's keep going. Three -- now,
19 C is the statutory license test, correct? Meaning
20 that the transaction occurred in a hypothetical
21 marketplace in which there is no statutory license,
22 correct?

23 A. Yes.

24 Q. And you agree that all the license
25 agreements that are before the judges for

1 consideration are affected to some degree by the
2 shadow of the statutory license, correct?

3 A. Yes, but that degree varies
4 substantially.

5 Q. Hold on.

6 And I was going to say, nonetheless,
7 you believe that the Merlin deal was directly
8 influenced by the presence of the statutory license
9 to the extent that it should be given reduced
10 weight as a benchmark, correct?

11 A. Well, not just the statutory license,
12 but the -- with Pandora-Merlin, the presence of the
13 Pureplay agreement.

14 Q. And I'll accept that as falling within
15 the ambit for this purpose of the statutory
16 license. Thank you.

17 And that's also a subject we'll turn
18 to.

19 Now, let's look at the last test, same
20 rights test, which you define as quote, "the
21 product sold consists of a blanket license for the
22 record companies' complete repertoire of sound
23 recordings to be used in compliance with the DMCA
24 requirements," unquote, correct?

25 A. Yes.

1 Q. And you would agree that the Merlin
2 agreement, with the adjustments proposed by
3 Professor Shapiro for skips and pre-1972
4 recordings, meets this criterion, correct?

5 A. Yes. There's a small issue about
6 skips, but I don't think it's significant. I think
7 generally this would be correct.

8 Q. So even giving a check minus to you're
9 a, with the reservations and assuming it doesn't
10 double count your concerns in C, you would agree
11 with me that we get two checks, one check minus,
12 and one X in stacking up against your four economic
13 tests of the Pandora-Merlin agreement, correct?

14 A. This is not a system I would use for
15 evaluating the benchmarks. I wouldn't do this by
16 having checks and check minuses.

17 Q. You stand by your summary that the
18 Pandora-Merlin agreement fails the judges'
19 comparability test according to your own
20 comparability criteria, correct?

21 A. Yes.

22 Q. Okay. Turning back to the statute, the
23 shadow of the statutory license, you cite as the
24 most fundamental reason the Merlin agreement is an
25 inappropriate benchmark. It's having been, quote,

1 "directly influenced by the Pureplay rates,"
2 unquote. That's from your written direct testimony
3 of Paragraph 64; is that correct?

4 JUDGE FEDER: Written rebuttal.

5 BY MR. RICH:

6 Q. Written rebuttal testimony.

7 Did I misspeak?

8 A. Yeah, I have it. That is correct.

9 Q. And you go on to say in this regard
10 that because Pandora had the option to elect the,
11 quote, "below market," unquote Pureplay rates,
12 Merlin was deprived of the ability to negotiate a
13 market rate," correct, same paragraph?

14 A. Yes. You just left out the ellipses
15 saying that the Pureplay rates are not
16 precedential; but, otherwise, that's correct.

17 Q. Thank you.

18 And by below market you meant below the
19 statutory Web III rates; is that correct?

20 A. Yes.

21 Q. Okay. So I take it that your view is
22 that Pandora would never enter into a direct
23 license agreement above the Pureplay rates during
24 the term of the Pureplay agreement, right?

25 A. I wouldn't quite say never, but I would

1 say because I can imagine some conditions under
2 which they might want to go somewhat above the
3 Pureplay rate, but I would say that would surprise
4 me if it did.

5 Q. Yeah.

6 And that Merlin, accordingly, would
7 have been unsuccessful had it attempted to
8 negotiate such rates, meaning above Pureplay in all
9 likelihood, correct?

10 A. I -- I would say that's generally true,
11 but the qualifier I have is that when the
12 negotiations include many dimensions, there may be
13 certain features that have value to you that are
14 not reflected simply on the Pureplay rate and
15 then -- so then we could get into a question as to
16 how to value those additional features. And from
17 the point of view of, say, Merlin, it may be those
18 features give it greater value than they would get
19 under the Pureplay rate.

20 Q. But how does -- how does your criticism
21 that the Pandora-Merlin agreement is -- should be
22 discounted or given reduced weight on account of
23 the direct influence of the Pureplay rates? How
24 does that explain why Merlin would have agreed to
25 rates below the Pureplay rates if, as you

1 hypothesize, the Pureplay rates are, quote, "below
2 market rates"?

3 A. I'm not convinced that Merlin has
4 agreed to rates that are below the Pureplay rates
5 from their point of view. My analysis suggests
6 that that's not true.

7 Q. And where is that analysis set forth in
8 any of your written testimony to demonstrate that
9 Merlin agreed to rates that were not below the
10 Pureplay rates?

11 A. Well, I've read the testimony in the
12 record by various experts that suggested that the
13 rate was below the Pureplay rate, and I did not
14 find that convincing. Everything I read is
15 entirely consistent with the rates being at or -- I
16 would say at the Pureplay rates.

17 Q. And what is this everything that you've
18 read that indicates that the rates are at or above
19 the Pureplay rates?

20 A. Well, for example, some of this goes
21 back further in time, but I think we're going to
22 hear from Mr. Lexton coming up soon. I've read his
23 written testimony, and that was consistent with the
24 rates being at the Pureplay rates. He described a
25 lot of the elements of the Pandora-Merlin deal from

1 Merlin's perspective and those items, as he
2 describes, or will describe it from Merlin's point
3 of view has significant value.

4 Q. Anything else that you can recall other
5 than what you understand the purport of Mr.
6 Lexton's testimony to be?

7 A. Well, I have -- I've read testimony
8 from experts for Pandora describing their
9 perspective, for example, Dr. Shapiro. I don't
10 read -- I can't recall off the top of my head all
11 the specifics of the testimony that I've heard --
12 that I read, sorry, but I remember Dr. Shapiro
13 talking about this issue as well.

14 Q. And do you recall Dr. Shapiro
15 testifying to the effect that the proper economic
16 interpretation of the Merlin-Pandora deal is that
17 it calls for effective rates at or above Pureplay?

18 A. Not specifically, but that would not
19 surprise me, but I -- I mean, maybe I'm confusing
20 it. I thought you -- you were asking me whether or
21 not I had found -- what I had seen that suggests
22 that the rates were at the Pureplay rate, and I
23 thought I explained -- I've already explained that
24 it's conceivable the rates could go so much higher
25 from the point of view of these parties. So I'm

1 not sure --

2 Q. Sir, I wasn't asking you what's
3 conceivable. I was asking you what basis, whether
4 from your own analysis or from any of the testimony
5 you've reviewed, leads you to form a professional
6 opinion as an economist that the best and most
7 proper reading of the Merlin-Pandora deal is that
8 it calls for rates at or above the Pureplay rates?

9 A. Calls for rates. I'm not sure what you
10 mean. I'm saying that when I read the testimony
11 that I've cited I found the testimony that
12 suggested that the rates were below the three
13 per-play rates not to be compelling and not just
14 beyond what I just told you. I can't give you
15 specific cites off the top of my head. This issue
16 has come up, I think, several times during the
17 proceeding.

18 Q. Did you do any calculations yourself of
19 the terms of the Pandora-Merlin deal to support the
20 conclusion that all the other analyses done, for
21 example, by Professor Shapiro is, quote,
22 "unconvincing" as to where those rates really
23 settle at?

24 A. I didn't say all of Professor Shapiro's
25 analyses are unconvincing. I just said on this

1 issue I did not find any analysis -- I have seen
2 compelling.

3 Q. Did you do any of your own analysis of
4 the economics of the Merlin-Pandora deal; yes or
5 no?

6 A. Sure, but by analysis, I mean, I
7 evaluated the work that others have done. If by
8 analysis, you mean did I do my own calculations --

9 Q. Yes.

10 A. -- on a number of these elements?

11 Q. Yes.

12 A. Many of these elements are very
13 difficult to analyze numerically. That's why
14 there's -- I can -- that's why there's some
15 difference of opinion.

16 Q. So is the answer no, you did not do
17 such an analysis?

18 A. No, I don't think that's a fair
19 characterization. To me, analysis means looking at
20 an issue as carefully as you can with the
21 information you have. It doesn't mean it's limited
22 to doing calculations.

23 JUDGE STRICKLER: Professor, if we
24 stick with the Pandora-Merlin agreement so we have
25 a stated rate for the final year of .14 with

1 steering, it could go down to .11. Now, as I
2 understand it, the questions and answers that have
3 been going back and forth for now deal with whether
4 or not the actual effective rate, as opposed to
5 that headline rate, is below, at, or perhaps even
6 above the Pureplay rate.

7 To determine that, don't you need to
8 know -- it seems that was a -- and correct me if
9 I'm wrong, we need to know the value, market value
10 of the other items within the Pandora-Merlin
11 agreement which you itemized on one of your slides,
12 correct?

13 THE WITNESS: Yes.

14 JUDGE STRICKLER: Is there any reason
15 to believe -- is there any reason to assume that
16 both Pandora and Merlin had the same -- assigned
17 the same value to those other items individually or
18 in sum?

19 THE WITNESS: I would not be
20 comfortable making that assumption. That's one of
21 the reasons it's difficult to evaluate the value of
22 these items.

23 JUDGE STRICKLER: You said it's
24 variations among the parties in these transactions
25 with regard to value which is why you want to look

1 at a number of transactions. So it could actually
2 be the case, could it not, that depending on from
3 whose perspective you're looking at, the
4 Pandora-Merlin agreement, the rate -- the effective
5 rate could be either above the Pureplay rate, at
6 the Pureplay rate, or below the Pureplay rate. For
7 example, if Pandora is paying .11 and is giving
8 certain extra items of value, that it only values
9 at .01, it's paying effectively .12. But if that
10 was still extra items of value, you have some
11 bargaining going on there, right, and you're
12 getting -- and Merlin values these extra items at
13 .4, exaggerate it a bit for purposes of the
14 example, it's getting .15 -- values at .04. So it
15 would be .11 plus .04 is .15, which is above the
16 Pureplay rate.

17 So depending -- you know, beauty is in
18 the eyes of the beholder, right, depending on who's
19 valuing these other items. We may be above the
20 Pureplay rate, at the Pureplay rate, or below the
21 Pureplay rate; is that accurate?

22 THE WITNESS: Well, I think it's
23 accurate almost all the way. I wouldn't quite
24 go -- agree with one thing you said. So I think
25 the -- the -- I agree totally that each party could

1 place a different value on the deal and it's also
2 correct that some of the components are ones that I
3 haven't -- I'm not sure Dr. Shapiro has either --
4 put specific numerical values on because it's very
5 difficult to do that.

6 So if the question is if the two
7 different parties place different values, how do
8 you describe the value of the deal because it's
9 different for two parties? And I think -- I agree
10 with you that that's quite possible. It's quite
11 possible that in certain deals that both parties
12 are risk takers and they might decide that they
13 want to have, say, a fixed component, a fixed
14 guarantee, and that will allow them to take the
15 risk that they'll both be better off if there is a
16 successful performance, in which case, the value of
17 the deal will be higher than the rate, somewhat
18 higher. So I think any of those possibilities
19 exist.

20 I was just saying to Mr. Rich that when
21 I looked at the arguments that the rates were
22 below, I didn't find those arguments compelling,
23 but I agreed that that's a possibility.

24 JUDGE STRICKLER: Because neither
25 party, as far as I know from the evidence that

1 we've seen so far, assigned particular values to
2 these items?

3 THE WITNESS: Right.

4 JUDGE STRICKLER: To that extent, isn't
5 the answer that it's indeterminate as to whether
6 the rates of the Pandora-Merlin agreement are
7 below, above or equal to the Pureplay rate?

8 THE WITNESS: I would be comfortable
9 with that conclusion, yes. I just wanted to make
10 it clear I did not find the argument that the rates
11 were below to be compelling, but I think the
12 conclusion that we're not sure whether they're
13 below or above is one I would be comfortable with.

14 JUDGE STRICKLER: Thank you.

15 BY MR. RICH:

16 Q. I take it you stand by your testimony
17 in your written direct testimony at Paragraph 90
18 where you state that, quote, "if the statutory rate
19 is too high, i.e., exceeds the market rates that
20 will be voluntarily negotiated between willing
21 buyers and willing parties in the absence of the
22 statutory license," which will be willing sellers,
23 "then licensees and licensors have a joint
24 incentive to renegotiate. One would expect that
25 the negotiation would arrive at the lower market

1 rates," unquote.

2 I take it you stand by that testimony?

3 MR. POMERANTZ: I'm sorry. You said
4 Paragraph 90 and I'm not seeing it.

5 JUDGE STRICKLER: Written direct?

6 MR. RICH: Written direct testimony.

7 MR. POMERANTZ: Oh, written direct.

8 Your Honor, I would object. We're here
9 only on rebuttal, and I don't see any reason we're
10 going back to direct testimony.

11 MR. RICH: This is just tying it to
12 this line of examination, Your Honors.

13 CHIEF JUDGE BARNETT: Overruled. We
14 can do this.

15 THE WITNESS: I can't recall whether
16 you read the entire paragraph, but...

17 BY MR. RICH:

18 Q. What's stated in Paragraph 90 you stand
19 by it, correct?

20 A. Yes. I just want to stress that the
21 last sentence is important because I said we did
22 not see widespread renegotiations in the statutory
23 rate and one can infer that the rate is not too
24 high.

25 Q. And you wrote that prior to your

1 awareness of the Pandora-Merlin deal, correct?

2 A. That's correct.

3 Q. Now, you agree that Merlin was not
4 compelled to enter into the agreement with Pandora,
5 correct?

6 A. Yes.

7 Q. And it could have always fallen back on
8 the Pureplay rates had it chosen to do so, correct?

9 A. Yes.

10 Q. And it, nevertheless, chose to enter
11 into the agreement, correct?

12 A. Yes.

13 Q. And thousands of Merlin labels have
14 signed on to that agreement, correct?

15 A. I don't know the number, but I think
16 it's quite a substantial number.

17 Q. Now, you also criticized the service --

18 MR. RICH: I'm moving to a new area,
19 Your Honors, if you want to take the morning break.

20 CHIEF JUDGE BARNETT: Great. Thank
21 you. You read my mind.

22 (A short recess was taken.)

23 CHIEF JUDGE BARNETT: Please be seated.

24 Go ahead.

25 MR. RICH: Thank you.

1 BY MR. RICH:

2 Q. Professor Rubinfeld, did you review
3 Appendix D to Professor Shapiro's written direct
4 testimony in which he accounts item by item for
5 what you term the full bundle of consideration that
6 was exchanged between the parties to the
7 Pandora-Merlin deal?

8 A. Yes, I would have read his entire
9 testimony.

10 Q. Just so the record is clear, you
11 undertook no such item-by-item evaluation of your
12 own; is that correct?

13 A. By "evaluation," you mean putting
14 numerical values on each of the components, that
15 would be correct.

16 Q. Trying to put some value component to
17 those, yes.

18 A. That's correct.

19 Q. Thank you.

20 Now, in your written rebuttal
21 testimony, you criticize the services' direct
22 licenses as both the iHeart-Warner license and the
23 -- to the extent that they offer the participating
24 record labels what you term, quote, "first mover
25 advantages" and, quote, "market share boosts."

1 That's in Paragraph 3.

2 I should have completed it to say you
3 criticize both the iHeart-Warner and Merlin-Pandora
4 agreements.

5 A. That's correct.

6 Q. And the basis of your criticism is that
7 the services could not offer every record label the
8 same incentives, correct?

9 A. Yes.

10 Q. And by "first mover advantage" in the
11 present context, you mean being the first record
12 companies to negotiate direct licenses at other
13 than the statutory rate, correct?

14 A. Well, the only question I'm hesitating
15 about is whether we should describe it as the
16 services -- from a services' point of view or from
17 the point of view of the record companies in the
18 sense it's both.

19 Q. I'll just indicate that that was a
20 manner in which you phrased it at your recent
21 deposition. But however you want to modify that is
22 your opportunity.

23 A. Well, I think it's both. But I mean in
24 Paragraph 3, which I was looking at, I described it
25 in terms of the services. I may have described it

1 the other way in my deposition. Either would be
2 appropriate.

3 Q. Thank you.

4 And you acknowledge that the reason a
5 record company would seek a first mover advantage
6 would be to secure a competitive advantage over
7 second or third movers, correct?

8 A. Yes.

9 Q. And the nature of that advantage could
10 include obtaining more market share at the expense
11 of one's competitors, right?

12 A. It could be, yes.

13 Q. And the term "market share boost" is
14 another way to describe steering to gain market
15 share, correct?

16 A. No. I don't think that's correct. It
17 doesn't necessarily have to involve steering.

18 In the Warner agreement you're getting
19 a market share boost by just getting a payment that
20 reflects a bigger share of the market. I think
21 that might be also characterized as a market share
22 boost.

23 You're getting more funds, and that
24 could be at the advantage of your competitors
25 without actually necessarily guaranteeing that

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1 you'll have plays equal to the boost that you got
2 through the financial arrangement.

3 Q. Let me just read you one passage from
4 your deposition, if you need to see it. I don't
5 think you will. Let me just see if this is
6 accurate. Not necessarily incompatible with what
7 you said, but I want to be sure.

8 You were asked at Page 348 of your
9 deposition, beginning at Line 24: "Now what do you
10 mean by market share boosts?"

11 And your answer at the top of 349 was:
12 "An agreement that says that we will compensate you
13 based on a higher share than the share of spins
14 that you've had in the past and that we will -- we
15 will put in place some effort to actually increase
16 the number of spins that you achieve."

17 Do you recall making that statement?

18 A. I don't recall it, but it sounds
19 exactly like something I would have said. So if
20 you tell me that's in my deposition, I have no
21 reason to disagree.

22 Q. Thank you.

23 And you would acknowledge that such
24 steering, were it to take place, reflects
25 competition at work, yes?

1 A. Yes. I would say it does.

2 Q. Nevertheless, it's your view that
3 direct license agreements between record labels and
4 noninteractive services that feature first mover
5 advantages and market share boosts should be given
6 reduced weight by the judges here, correct?

7 A. Yes. Because they're arrangements that
8 can't be replicated across the industry, which is I
9 think what you're looking for when you're trying to
10 design a statutory rate, is something that would
11 apply to everyone.

12 Q. And in your view, in Paragraph 70 of
13 your written rebuttal testimony, the statutory
14 license doesn't contemplate such forms of
15 competition, correct?

16 A. Let me look at Paragraph 70.

17 Yes. That's correct.

18 Q. Now, also as to steering, you claim in
19 Paragraph 153 of your written rebuttal testimony
20 that, insofar as the majors are must-haves for
21 noninteractive services to the same degree as they
22 are with respect to interactive services, steering
23 efforts by noninteractive services directed to
24 majors in a hypothetical market where there is no
25 statutory license would be thwarted by the majors'

1 ability to withhold their entire catalogs, correct?

2 A. So in Paragraph 153 I used withholding
3 of the entire catalog as one possible response. I
4 said -- I described it as an example.

5 In my testimony earlier today, I
6 described other possible responses that also could
7 defeat the steering exercise.

8 Q. But you believe that a viable scenario
9 in this hypothetical market, as you would envision
10 it, would allow, in your words -- Universal, for
11 example, could use as leverage its ability to
12 withhold its entire catalog, which would leave
13 Pandora in a similar bargaining situation as
14 Spotify would be in the interactive space, correct?

15 A. I believe that's an example. I would
16 think it would be -- it would be a strong strategic
17 response. It's quite possible that, if we're in a
18 situation, that Universal maybe would not need to
19 be as aggressive as saying, "We're going to
20 withhold the entire catalog." There are other
21 options they would have as well. But yes, this
22 would be one possibility.

23 Q. And this was one that you proffered in
24 your testimony.

25 A. I did.

1 Q. Correct?

2 A. Yes.

3 Q. Because you believed it to be a real
4 possibility, correct?

5 A. Yes.

6 Q. And the interactive space in which you
7 -- to which you advert, that is the space in which
8 Spotify occupies, is one in which the majors have
9 all or nearly all the bargaining power, correct?

10 A. Well, that's what I said at the time of
11 the Universal-EMI deal, if that's what you're
12 quoting.

13 My view is there's been a -- I'm not
14 sure it's exactly the same language now.

15 Are you quoting from -- are you quoting
16 from the Universal-EMI deal? I forget the exact
17 adjective I use.

18 Q. I believe, during your direct
19 examination, you said you had a quibble or at least
20 a difference with the stated position of one of the
21 majors as to the degree of bargaining power that
22 was represented that a major has to the FTC.

23 And you said, in your view, the
24 representation by that major that it had all the
25 bargaining power overstated somewhat your

1 perspective, which was that a major had nearly or
2 almost all the bargaining power; is that correct?

3 A. I would have said something to that
4 effect. But I just want to add that, over the
5 three or four years since that period in time has
6 passed, I think there's been a small change. I
7 wouldn't say a large change.

8 I think there's been some additional
9 bargaining power on the part of the services.
10 Still I would say most of the bargaining power is
11 in the hands of the record labels.

12 Q. And that's since the time when four
13 majors went to three majors?

14 A. Yes. And also since the time in which
15 there's been substantial convergence in the
16 industry.

17 Q. Yeah. And so this dynamic that you
18 advert to or hypothesize in your Paragraph 153 in
19 which a Universal could withhold its entire
20 repertoire if Pandora threatened to steer I take it
21 is a market dynamic that meets the effective
22 competition test mandated by this proceeding, in
23 your view?

24 A. Sounds like you're asking me -- if
25 you're asking me for a legal opinion, first, I

1 don't believe --

2 Q. No. As --

3 A. -- I have a legal opinion.

4 Q. -- an economist.

5 A. Yes. I think this is -- this market is
6 competitive in the sense I've been using the term
7 "competitive." That is -- I forget the exact
8 definition, but I think both parties have some --
9 have bargaining power, and we've seen evidence of
10 competition throughout this hearing.

11 Q. Now, you also contend that Merlin and
12 Pandora are, quote, "uniquely situated buyers and
13 sellers." That's at Paragraph 65 of your written
14 rebuttal testimony.

15 Do you recall that?

16 A. Maybe I'm in the wrong place, but I'm
17 not seeing that.

18 Can you double-check the cite?

19 Q. Do you -- I think you're right. I may
20 have a miscite.

21 Do you recall, however, characterizing
22 the parties as uniquely situated?

23 JUDGE STRICKLER: I think it is in
24 Paragraph 65.

25 MR. POMERANTZ: Yeah. I think maybe --

1 Professor Rubinfeld may be in his direct testimony.

2 MR. RICH: I'm sorry.

3 JUDGE STRICKLER: It's in his rebuttal
4 testimony.

5 MR. POMERANTZ: Just check to see
6 direct or rebuttal.

7 BY MR. RICH:

8 Q. Are you in your rebuttal testimony?

9 A. I am. Oh, I see it now. Yeah, I just
10 -- I missed it.

11 Yes. It does say --

12 Q. Second sentence.

13 A. I did say it's a uniquely situated
14 buyer and seller.

15 Q. Yes. Let's examine that as to each of
16 the parties, if we can.

17 As to Merlin, I take it this is your
18 view principally because Merlin's members' directly
19 licensed catalogs represent a small percentage of
20 total Merlin spins, correct?

21 A. I'd say that's the primary reason. I
22 mean also Merlin's unusual because it has so many
23 labels that are members of Merlin and because those
24 labels do have the option of going along with the
25 negotiated agreement or not.

1 So even though there are many labels
2 that -- many -- yeah, many labels, they don't
3 necessarily have to go along with any negotiated
4 agreement that Merlin might reach.

5 Q. And I believe, as you reinforced on
6 your redirect examination by Mr. Pomerantz, you
7 said that, while Merlin is a significant label,
8 it's not a major and doesn't have the -- my word
9 now -- clout of a major label, correct?

10 A. Yes. I just would -- I wouldn't
11 describe it as a label. I'd say it's a significant
12 player but not nearly as significant as one of the
13 majors.

14 Q. As one of the majors. Right.
15 And such that, as you state in
16 Paragraph 66, quote, "Merlin's interests and
17 incentives likely differ substantially from those
18 of the major labels," unquote, correct?

19 A. Yes.

20 Q. But you haven't made any analysis of
21 nor drawn any conclusions as to the relative
22 quality of the catalogs of Merlin members vis-à-vis
23 the majors, have you?

24 A. If by that you mean that I have not
25 looked at the artists that are covered in the

1 labels and evaluated their success or lack of it --

2 Q. Yes.

3 A. -- that would be correct.

4 Q. Okay. And nor have you undertaken any
5 study of the relative promotional or substitutional
6 effects of spins on Pandora of songs of the majors
7 versus those of the Merlin labels, true?

8 A. That would be true if, again, by
9 "analysis" you mean anything on the numerical side,
10 that would be correct.

11 Q. Any empirical analysis.

12 A. That would be correct.

13 Q. And likewise, you haven't undertaken
14 any analysis of the relative steering ability
15 possessed by Pandora in relation to spins of the
16 majors versus the Merlin labels; isn't that also
17 true?

18 A. I think my answer is yes, with the
19 qualification that I have carefully evaluated the
20 steering analyses that others have done --

21 Q. And we'll get to that --

22 A. -- but have not --

23 Q. We'll look at that --

24 A. -- done a separate --

25 Q. Thank you. We'll get to that in a bit.

1 In the --

2 A. I --

3 Q. Pardon me.

4 A. Let me just finish my sentence for the
5 record.

6 I was going to say, otherwise, I have
7 not done my own separate, independent empirical
8 study.

9 Q. Thank you.

10 You nevertheless state in Paragraph 66
11 that you are, quote, "unconvinced," unquote, by
12 Professor Shapiro's own conclusions as to both
13 Pandora's relative elasticity of demand for the
14 catalogs of the majors versus the Indies; or
15 secondly, the promotional effect of Pandora on
16 majors versus Indies; is that correct?

17 A. I'm just having trouble finding the
18 quote you're -- from --

19 Q. The only quote I made -- intended to
20 make was the word "unconvinced" --

21 A. But would you mind --

22 Q. -- as to those analyses.

23 A. -- repeating your --

24 Q. Yes. Sure.

25 So in Paragraph 66, I take it, you

1 indicate you're unconvinced by the conclusions
2 Professor Shapiro reached on two topics: one,
3 Pandora's relative elasticity of demand for the
4 catalogs of the majors and the Indies; and two, the
5 promotional effect of Pandora on majors and the
6 Indies.

7 You say you're unconvinced by his
8 analyses, correct?

9 A. I just -- that's not a description of
10 exactly what I say in Paragraph 66. So I'm just
11 confused about how to answer your question.

12 Q. Well, do you or do you not find
13 unconvincing Professor Shapiro's assertion that
14 there is no meaningful difference for the major
15 labels and the Indy labels in the, little one,
16 marginal cost to the label, and two, the services'
17 elasticity of demand for the label's catalogs?

18 A. Yes. I agree with that.

19 Q. Okay. But it is also the case that,
20 while you are unconvinced by his conclusions, but
21 beyond that naked statement, you've not presented
22 the judges with any evidence of your own that would
23 contradict, let alone undermine, his conclusions,
24 have you?

25 A. With respect to the statement in

1 Paragraph 66.

2 Q. Yes.

3 A. Give me just a minute.

4 Well, I would only agree with your
5 question in the narrow sense of talking -- if
6 you're talking about empirical studies.

7 But a lot of work I've done in this
8 case, I think informs the question that's raised in
9 Paragraph 66. So I wouldn't want to say I haven't
10 done any analysis.

11 But I would agree that I can't -- I
12 don't believe I've put forth empirical studies that
13 would respond directly to this.

14 Q. All right. Thank you.

15 A. It's a much narrower answer.

16 Q. Thank you.

17 At the bottom you've not analyzed
18 whether the Merlin deal terms would be acceptable
19 to a major, have you?

20 A. It's a little hard for me to imagine a
21 major accepting deal terms that have headline rates
22 that are near the Pureplay rates. So I'm not sure
23 what you mean by analyze.

24 Q. Well, at your deposition you appeared
25 not to have that difficulty. I'll read you from

1 Line 15 at Page 379. You can see this at any time
2 you like. One question, one answer.

3 Question: "Have you performed any
4 analysis whether the rates negotiated with Pandora
5 by Merlin would have been acceptable to one or more
6 majors?"

7 Answer: "I have not."

8 A. Yes. Because, again, I -- we have to
9 just be clear about the use of the word "analysis."

10 I keep -- when you use the term, I
11 assume we're talk specifically about something
12 empirical where I've study the details of the
13 contract, tried to evaluate and so on. And in that
14 sense, the answer is no.

15 But as I said, it's hard to imagine
16 that a major would accept Pureplay rate.

17 Q. In fact, you conclude elsewhere in your
18 rebuttal testimony that Merlin has attained similar
19 rates to the majors in other direct license deals,
20 correct?

21 A. Where are you citing?

22 Q. Well, it's all over the place. It's
23 Paragraph 67, Paragraph 128, Paragraph 175 through
24 176, probably other places.

25 A. Well, the paragraphs may well differ

1 because --

2 Q. Please take a look --

3 A. Please let me finish my sentence.

4 And they may differ because, for
5 example, in Paragraph 67, I'm talking about similar
6 minimum play rates and share of revenues, but I'm
7 not talking about experts that may be affiliated
8 with the deals.

9 And I -- in some of the other
10 paragraphs, which I'd be happy to go through with
11 you, I think I probably have somewhat different
12 characterizations of the deals.

13 So I can't agree with your statement
14 the way you made it.

15 Q. Turn to Paragraph 127, please. You
16 there state, quote, "Another factor demonstrating
17 competition in the interactive services market is
18 that independent labels with substantially smaller
19 catalogs than the majors have negotiated the same
20 or similar rates with interactive streaming
21 services," unquote.

22 You believe that to be true, correct?

23 A. Yes.

24 Q. And you use the evidence you marshalled
25 with respect to supporting your interactive

1 services benchmark to justify not making a material
2 adjustment to your benchmark analysis, which is
3 based on transactions entered into by the majors
4 with interactive services, in order to account for
5 potential differences in the rates that might be
6 obtained by Indies, correct?

7 A. No. I think that is an inaccurate
8 characterization of what I do. Because you're
9 leaving out the fact that there are aspects of the
10 deals that go beyond the negotiated rates.

11 So unless you can show -- I don't know
12 what specific sentence you're talking about. But
13 once you account for all of the other goodies in --
14 what I've sometimes called goodies in the deal or
15 lack of goodies, the deals do sometimes look quite
16 different.

17 Q. And you attempted to quantify that
18 difference, didn't you, in order to bolster the
19 validity of your interactive services benchmark?

20 A. I believe I put forward a number to
21 give an idea of what difference it would make. But
22 I -- it's a little hard for me to remember exactly
23 which part of my testimony you're talking about.

24 But I was never able to do an empirical
25 analysis of the value of all these components. I

1 think I just put forward an assumption about what
2 the value might be to illustrate a conclusion I
3 reached.

4 Q. Are you certain that you never did an
5 empirical analysis of that topic?

6 A. Depends on what you're talking about.
7 What I'm remembering now is a point of which I
8 attributed I think a 2 percent value to some of the
9 extras.

10 And if that's what you mean by
11 "empirical analysis," then the answer might be yes.
12 If you're thinking about something other than that,
13 you'll have to refresh my memory.

14 Q. And by 2 percent, what does that 2
15 percent represent?

16 A. I need to -- at this point, if we're
17 going to go into detail, I really need to go back
18 and refresh my memory as to where that occurs and
19 what I said. I'm going now back to general
20 recollections, and I haven't looked at this in a
21 while, so...

22 Q. You recall we covered this topic in
23 your direct examination --

24 A. This has all been --

25 Q. -- some weeks ago --

1 A. Yeah.

2 Q. -- your first examination some weeks
3 ago?

4 A. Yes. This has all been covered before.

5 Q. I think the record will -- I don't want
6 to burden the Court's time now to have you refresh
7 yourself on your testimony, but I think the record
8 will reflect the fact that you, in fact, made a 2
9 percent adjustment to account for possible
10 valuation differences between Indies and majors,
11 correct?

12 You did -- you did support that and
13 propose that to the Court, correct?

14 A. As I just told you, I did recall a 2
15 percent adjustment. I was simply pointing out that
16 that wasn't based on a sort of detailed analysis of
17 the value of each of the components because I
18 wasn't able to do that.

19 Q. And for that reason, you termed it
20 "conservative," as I recall, correct?

21 A. I have no reason to dispute that, but I
22 don't remember that.

23 Q. Okay. Turning to Pandora as a uniquely
24 situated entity, you claim at Paragraph 69 of your
25 written rebuttal testimony that Pandora is in what

1 you call a power position in the Webcasting
2 industry, correct?

3 A. Yes.

4 Q. You're familiar with the term
5 "monopsony power," correct?

6 A. Yes.

7 Q. Economists use that term to capture the
8 same notion as monopoly power on the buyer side of
9 the market rather than the seller side of the
10 market, true?

11 A. Well, generally true. But there are
12 differences that make it not a perfect analogy.

13 Q. In theory, a firm with monopsony power
14 might pay a price below the competitive level for
15 an input just like a firm with monopoly might
16 charge a price above the competitive level for its
17 output, correct?

18 A. That's correct as a matter of theory,
19 yes.

20 Q. Okay. You're familiar with the
21 empirical analysis that Professor Shapiro performed
22 to establish that Pandora does not have monopsony
23 power as a buyer of rights to recorded music?

24 A. You'll have to refresh my memory.

25 Q. Well, you either recall it, or you

1 don't sitting here today. It's in his written
2 direct testimony.

3 A. I'm not recalling a discussion of
4 monopsony power off the top of my head.

5 Q. And you did not do any empirical work
6 of your own in response to that or otherwise on the
7 issue of potential monopsony power by Pandora,
8 correct?

9 A. I have not studied monopsony power.
10 But I want to make it clear for the
11 Court that there is a difference between having
12 monopsony power and having bargaining power. You
13 can have substantial bargaining power but yet not
14 have monopsony power.

15 Q. But you agree with Professor Shapiro,
16 at least with the concept of monopsony power, that
17 Pandora does not have monopsony power as a buyer of
18 rights to perform recorded music, correct?

19 A. I would have -- I'm not certain I would
20 agree with that. I would have to take a little
21 more time to think about that and go over what
22 Professor Shapiro has written.

23 Q. Take a look at --

24 A. I don't think I've expressed an opinion
25 about that either way.

1 Q. Take a look in your binder at your
2 April 13th deposition transcript, please.

3 JUDGE STRICKLER: What tab is that,
4 please?

5 MR. RICH: So this is labeled 4-13-15
6 Rubinfeld in the binder. This is in the
7 cross-examination binder.

8 BY MR. RICH:

9 Q. And turn to Page 391.

10 A. Okay.

11 Q. Beginning at line 9.

12 Question: "I take it you're not
13 arguing that Pandora exercised monopsony power in
14 its dealings with Merlin, are you?"

15 Answer: "I wouldn't be comfortable
16 using the term "monopsony power" because that
17 would -- in order to have monopsony power, you
18 would have to have the ability to cut back on the
19 amount that you're willing to purchase, if you
20 will, in order to get a lower price. But I -- and
21 I don't see any evidence of that. But I would say
22 they have bargaining power with respect to Merlin
23 because of their size."

24 Do you see that?

25 A. Yeah. That's exactly what I was trying

1 to express before. It's very hard to evaluate the
2 monopsony power issue. But I am convinced -- and
3 so I'm not sure where I come down, but I am
4 convinced that Pandora has some bargaining power
5 because of its success in the marketplace.

6 Q. You level certain criticisms of the
7 steering experiments conducted by Dr. McBride at
8 Professor Shapiro's request, correct?

9 A. Yes.

10 Q. For one, you suggest that the 13-week
11 duration of the experiment may have been too short;
12 that had the experiment run longer, it's likely
13 that there would have been a steeper falloff in
14 observed listenership, correct?

15 That's at Paragraph 146 of your written
16 rebuttal testimony.

17 A. I'm pretty sure I said that, yes.

18 Q. And as support for that inference, you
19 created Exhibit 13-A to your written rebuttal
20 testimony; is that correct?

21 A. I don't remember the exhibit numbers
22 supporting it, but I'll check. I don't --

23 Q. It should be in your --

24 A. -- want to --

25 Q. It should be in your binder.

1 MR. RICH: Apologies, Your Honors.

2 You've got to flip through a little bit of the blue
3 tabs to get to it. Looks like this when you get
4 there.

5 This is in the cross-examination binder
6 at the back end of this witness's written rebuttal
7 testimony, SX 0029. And we've put it up on the
8 screen as well with one slight emendation.

9 THE WITNESS: All right. Counsel,
10 would you just refresh my memory as to which
11 paragraph we're talking about?

12 BY MR. RICH:

13 Q. Yes. Surely.

14 This is -- Paragraph 145, 146 generally
15 discuss this.

16 A. Thank you.

17 MR. RICH: For Your Honors' benefit,
18 we've reproduced precisely Exhibit 13-A but with a
19 dotted line, which, Counsel, we have inserted.
20 This is exactly the demonstrative which my partner,
21 Mr. Marks, used with Dr. McBride during his direct
22 examination.

23 BY MR. RICH:

24 Q. Am I correct, Professor Rubinfeld, that
25 Exhibit 13-A created by you purports to demonstrate

1 that, quote, "the loss of listenership tends to
2 grow as the experiments continue," unquote, over
3 that 13-week span?

4 Quoting from Paragraph 145.

5 A. Yes.

6 Q. And further in that same paragraph,
7 that, quote, "The average effect over the entire
8 13-week period of the experiment understates the
9 effect during the later portion after listeners
10 begin to detect the effects of the steering,"
11 unquote; is that correct?

12 A. Yes.

13 Q. Now, we've drawn a line down at week
14 eight of that 13-week experiment and directed your
15 eye to the demonstrative.

16 Can you identify for me a single point
17 on any of the colored graph lines representing
18 overspins and underspins of the majors as depicted
19 in which between week eight, which is 7-17-2014,
20 and the final week, which is 8-28-2014 -- the last
21 digit got cut off -- there is, as you assert,
22 evidence of loss of listenership continuing to grow
23 in the latter portion?

24 A. So unless I'm misreading my own table,
25 loss of listenership would grow in the negative --

1 the graph -- the lines that are negative tend to
2 become more negative.

3 So I'd be looking for downward sloping
4 curves, and I see some. So, for example, the --
5 let's just take the light green, which I see light
6 green is UMG or the -- one of the -- oh, I see.
7 Let's see. The dark -- dark blue.

8 So the one that curves, I see they're
9 going down are 30-week experiments.

10 JUDGE STRICKLER: 30 week or 30 percent
11 steering?

12 THE WITNESS: Sorry. 30 percent
13 steering. Thank you, Your Honor.

14 BY MR. RICH:

15 Q. Is that that bottom-most green line?

16 A. Yes. So I'm just trying to read this
17 correctly. I'm having a little trouble because
18 it's either my eyes or the chart that it's very
19 fussy. Bear with me.

20 Ah, thanks. That's a lot clearer.

21 So I'm not -- let's go back to your
22 question. I wanted to distinguish my answer
23 between the 30-week and 15-week experiments. And I
24 didn't know whether your question was
25 distinguishing those.

1 But any curve that continues to fall,
2 if it's below -- if it's below zero, would be a --
3 one where the effect is -- steering is becoming
4 bigger.

5 Q. And how many of the other plotted lines
6 do you see with a falling curve from the point of
7 the dotted line to the end of the experiment?

8 A. Well, many of the curves are falling,
9 and then they go up again. So if you're asking me
10 whether they -- to compare where they begin at one
11 point and where they end, where they end is a
12 different question than the one you've asked
13 previously.

14 Q. Does any of these data points end in
15 week 13 at a point lower than depicted in week
16 five -- in week eight? Pardon me.

17 A. It looks -- yes. It does look to me
18 like the darker blue line, which I think is Sony,
19 ends up lower at the end.

20 Q. By about five-hundredths of a percent?

21 A. Yes. Something like that.

22 Q. What's --

23 JUDGE STRICKLER: And just for
24 clarification for the record, that's Sony on a 30
25 percent steering.

1 THE WITNESS: Yes.

2 JUDGE STRICKLER: Thank you.

3 BY MR. RICH:

4 Q. And what is the Y axis range from top
5 to bottom? What is it showing in terms of
6 percentage increase or decrease from -- what is the
7 scale?

8 A. The scale is in -- well, it ranges from
9 a high of plus .3 percent to a low of minus .7
10 percent.

11 Q. Total span of 1 percent?

12 A. Yes. That's right.

13 MR. RICH: You can take that down.
14 Thank you.

15 BY MR. RICH:

16 Q. Now, you also assert, beginning at
17 Paragraph 144 of your written rebuttal testimony,
18 that the reported loss of listenership as a result
19 of the steering experiments would, if continued,
20 likely have what you term a nontrivial cost to
21 Pandora, correct?

22 A. Yes.

23 Q. And to demonstrate that proposition,
24 you calculate the anticipated financial impact were
25 Pandora to continue to steer for a one-year period

1 holding constant the average effective of the
2 listenership loss measured over the period of the
3 13-week experiment.

4 Have I got that right?

5 A. Well, this -- you're referring to the
6 discussion in Paragraph 146, I believe.

7 Q. Yes.

8 A. Give me just a minute.

9 Yes. I think your description was
10 accurate.

11 Q. And in Paragraphs 146 to 148, without
12 reading any numbers into the record, you report
13 that Pandora will be expected to lose considerable
14 millions of dollar in what you term, quote, "net
15 income," unquote, were it to pursue that commercial
16 course, correct, for a longer period of time?

17 A. Well, if I'm referring to the part I
18 think you're referring to, the -- which is
19 Paragraph 147, there I talked about what would --
20 the effect would be at the maximum loss of
21 listenership during a 13-week period.

22 I have different calculation in
23 Paragraph 146. I'm not sure which one you're
24 referring to.

25 Q. Isn't it the case that what you were

1 attempting to establish and then depict in your
2 Exhibit 13-B -- we just looked at 13-A -- in your
3 13-B was that, had these steering experiments been
4 continued, and had one observed the rate of decline
5 in listenership that was observed during the 13
6 weeks, it would end up being costly proposition for
7 Pandora?

8 Isn't that what you were attempting to
9 establish?

10 A. Yes. That's generally true.

11 Q. Okay. Now, in performing that
12 analysis, you simply looked at the revenue side of
13 the equation, isn't that true, in terms of impact
14 on Pandora?

15 A. Yes. I -- by reference, I -- I would
16 say I just looked at the cost. I did not try to
17 evaluate -- to do a full benefit cost analysis.
18 That's correct.

19 Q. Right.

20 But you nevertheless estimated -- what
21 you did -- tell me if I'm wrong -- as depicted in
22 13-B, you estimated the impact on Pandora's
23 revenues based on assumed loss of listenership and
24 then calculated what you term a, quote, "annual
25 revenue loss restated as a percentage of annual

1 income," unquote, by dividing the revenue loss you
2 calculated by Pandora's third quarter 2014 reported
3 quarterly nonGAAP net income, correct?

4 A. I mean I don't remember the
5 specifics -- I have to go -- of exactly the
6 calculation.

7 Q. You can look at 13-B if it will help
8 you.

9 A. I will take a look.

10 So yes. I took the nonGAAP net income
11 for one quarter of 2014, turned it into an annual
12 number so I had an annual income number. And I
13 took my estimated revenue loss as a percentage of
14 that annual number.

15 Q. Now, in performing your calculation,
16 you simply assumed, notwithstanding active steering
17 of plays on Pandora's part, that the royalty rates
18 Pandora pays would remain unchanged from the
19 present circumstance, correct?

20 JUDGE STRICKLER: You mean royalty
21 rates in that question or royalty revenues?

22 MR. RICH: Royalty rates.

23 THE WITNESS: You're correct. I did
24 not make any change in the royalty rates.

25 BY MR. RICH:

1 Q. And so unlike Professor Shapiro, who --
2 in his Appendix F, Tables F2 and F3 to his written
3 direct testimony, who explicitly accounts for both
4 potential revenue falloff and offsetting savings in
5 royalty payments, you simply ignored the royalty
6 payment side of that equation, correct?

7 A. I don't think "ignored" would be the
8 right word, but I --

9 Q. You made no adjustment for.

10 A. There -- I had some questions as to
11 whether one should make an adjustment. But I --
12 you're correct is that I did not make such an
13 adjustment.

14 If you want to discuss Professor
15 Shapiro's tables, I'd be happy to discuss that as
16 well. But I was not convinced it was appropriate
17 to make an adjustment.

18 Q. So the net effect of your analysis, as
19 depicted in 13-B, is to establish the proposition
20 that, assuming Pandora were to steer the majors'
21 repertoires at rates reported by the steering
22 experiments, and however improbably fail to use
23 that steering ability to attain royalty savings, it
24 likely would sustain reduced income, correct?

25 A. No. I don't agree with the way you

1 stated the question.

2 Q. You state in Paragraph 4 of your
3 written rebuttal testimony -- strike that. Last
4 questions.

5 In your Paragraph 77(c) to your written
6 rebuttal testimony, you criticize Professor
7 Shapiro's treatment of the skips and performances
8 of pre-1972 sound recordings called for by the
9 Merlin agreement and purport to correct his
10 analysis in your own Exhibit 9, correct?

11 A. Yes.

12 Q. Now, at your deposition, on questioning
13 about that, you said you wanted to reconsider that
14 aspect of your testimony because you might have
15 misinterpreted what Professor Shapiro had done.

16 Do you recall that?

17 A. Vaguely, yes.

18 Q. Have you done -- have you undertaken
19 such a reconsideration?

20 A. No, I don't believe I did. I don't
21 recall any specific readjustments that I made.

22 Q. In fact, it's your own computation
23 that's in error, isn't it?

24 A. Not that I'm aware of.

25 Q. Weren't you adjusting for what the

1 actual value of the Merlin-Pandora agreement was in
2 place of what Professor Shapiro does, which is to
3 calculate -- to make adjustments so that an
4 effective statutory rate would be computed by
5 taking 372 performances out and adding skips back
6 in?

7 And don't you do the opposite?

8 A. I would have to go back and look at it.
9 I do agree that it would be appropriate to try to
10 mirror what the statute -- statutory requirement
11 would be.

12 But I don't recall -- I'd have to go
13 back and look at my calculations to see exactly
14 what I did.

15 MR. RICH: Which is what you indicated
16 you would do at the time of your deposition.

17 I have no further questions.

18 JUDGE STRICKLER: Question for you,
19 Professor Rubinfeld.

20 Exhibit 13-B is your calculations of
21 the cost of steering away from the majors at 30
22 percent.

23 Is there a similar exhibit in your
24 testimony regarding the steering away from the
25 majors at 13 percent? Excuse me. At 15 percent.

1 I'm sorry.

2 THE WITNESS: I don't believe there is.
3 I'm sure I looked at the calculation, but I don't
4 think I produced a separate exhibit.

5 JUDGE STRICKLER: Another question for
6 you on an earlier topic that you've mentioned --
7 that you've discussed before in your answers.

8 You distinguish between bargaining
9 power on the one hand and monopoly or monopsony
10 power on the other.

11 Can you explain what you mean by the
12 difference between those?

13 THE WITNESS: Yes. So monopsony
14 power -- this is actually in Chapter 10 of my
15 textbook.

16 Monopsony power arises because you
17 actually cut back the amount you purchase and pay a
18 lower price. So you actually have some power over
19 price.

20 Bargaining power is really more about
21 dividing the pie. So you can have bargaining power
22 in which you get a bigger piece of any surplus
23 you're negotiating over but not actually have the
24 power to control the price directly.

25 JUDGE STRICKLER: In bargaining -- the

1 elements of bargaining include a threat point, a
2 point where you can walk away, correct?

3 THE WITNESS: Yes.

4 JUDGE STRICKLER: Does the existence of
5 monopoly or monopsony power, depending on which
6 side of the market you're on, affect your threat
7 point?

8 THE WITNESS: Yes. It definitely could
9 affect your threat point.

10 But -- and if you have monopsony power,
11 you almost certainly are going to have bargaining
12 power if you're in a bargaining situation.

13 But it doesn't go the other way. You
14 could have significant bargaining but still not
15 have monopsony power.

16 JUDGE STRICKLER: Thank you.

17 MR. RICH: Thank you.

18 MS. HALL: Good afternoon, Your Honor.

19 I'm happy to begin my examination now.

20 I note that it's noon. And I could come back and
21 do it after the break if you'd prefer that. But
22 I'm happy to do it now.

23 CHIEF JUDGE BARNETT: It's almost noon.
24 But let's take the break rather than have you have
25 to stop and start. Because that would lend itself

1 to repetition.

2 So we'll be at recess until 12:55.

3 (A short recess was taken.)

4 CHIEF JUDGE BARNETT: Please be seated.

5 Ms. Hall, good afternoon.

6 MS. HALL: Good afternoon.

7 JUDGE STRICKLER: Are we going to need
8 the other binder, the other cross-examination
9 binder?

10 MS. HALL: No, you will not. I have
11 questions based on my direct examination binder.

12 JUDGE STRICKLER: Thank you.

13 CROSS-EXAMINATION BY COUNSEL FOR IHEARTMEDIA

14 BY MS. HALL:

15 Q. Good afternoon, Professor Rubinfeld.
16 We have met before but my name is Caitlin Hall. I
17 represent iHeartMedia.

18 A. Nice to meet you again.

19 Q. You, too.

20 In your testimony, you analyzed the
21 agreement between iHeartMedia and Warner and you
22 derive a benchmark rate based on actual performance
23 after the agreement, correct?

24 A. Yes.

25 Q. And in your written testimony, you

1 repeatedly characterized reliance on expectations
2 in the actual performance as inappropriate,
3 correct?

4 A. I characterized the use of expectations
5 by one side of -- by one party only as
6 inappropriate. I don't think I say expectations
7 generally are necessarily inappropriate.

8 Q. Do you recall testifying that you
9 believed that the appropriate approach in this case
10 was to rely on performance data?

11 A. With respect to the iHeartMedia-Warner
12 deal, that is my view, yes.

13 Q. Okay.

14 A. But it is not a general view. I have a
15 discussion in my testimony where I explain the
16 tradeoff between looking at performance data and
17 looking at expectations.

18 Q. Are you aware that following the
19 submission of your written rebuttal testimony,
20 counsel for SoundExchange filed a motion to exclude
21 the testimony of Professor Fischel on the
22 iHeartMedia Warner agreement on the basis that it
23 relied on expectations rather than performance?

24 A. I actually don't recall that.

25 Q. No? You are not aware that the sole

1 basis of that motion was your testimony saying that
2 it was inappropriate?

3 A. I don't remember that submission. They
4 didn't talk to me about it. At least, if they did,
5 I don't recall it.

6 Q. Would a submission along those lines
7 have been justified from an economic perspective in
8 your opinion?

9 A. If the submissions said it is
10 inappropriate to rely on testimony based on simply
11 one side's view of the expectations, I would be
12 supportive of that submission.

13 Q. I'm going to ask you to turn to Tab 1
14 of the binder in front of you, which is
15 SoundExchange Exhibit 29.

16 Do you recognize this as your written
17 rebuttal testimony?

18 A. I do.

19 Q. Can you please turn to the page labeled
20 SX-29-10.

21 A. I'm there.

22 Q. Do you see the Header 2, quote:

23 "Professors Fischel and Lichtman inappropriately
24 rely on projections associated with the
25 iHeartMedia" --

1 CHIEF JUDGE BARNETT: You have to read
2 more slowly.

3 BY MS. HALL:

4 Q. Quote: "Professors Fischel and
5 Lichtman inappropriately rely on projections
6 associated with the iHeartMedia Warner agreement
7 rather than its performance."

8 A. Yes.

9 Q. Now, when you were here before, you
10 testified that you had reviewed the prior orders in
11 prior Webcasting proceedings, correct?

12 A. Yes.

13 Q. So you are aware that in Web I, the
14 Librarian of Congress indicated that the parties'
15 expectations at the time of the agreement were what
16 were relevant in determining a benchmark rate in
17 the agreement?

18 A. I actually don't recall that either
19 way. You'd have to refresh my memory.

20 MS. HALL: Can we circulate the --
21 thank you, federal reporter.

22 BY MS. HALL:

23 Q. And Dr. Rubinfeld, I'm going to be
24 asking you questions about the page labeled 45255.

25 First, let me ask: Do you recognize

1 this as the final order in the Web I proceeding?

2 A. Yes, I do.

3 Q. So turning to that page, again ending
4 in 255, you see Section 8, methodology for
5 calculating the statutory rates for the Webcasting
6 license?

7 A. I see that, yes.

8 Q. And in the first paragraph beginning
9 about halfway down, do you see the language, quote:
10 "To calculate this unitary rate, it is necessary to
11 determine what Yahoo paid for the initial 1.5
12 billion performances based on the lump sum payment
13 and what it expected to pay for transmissions after
14 that time."

15 A. I do see that.

16 Q. Then continuing toward the middle of
17 the following paragraph, do you see the language,
18 quote: "This is a simple arithmetic calculation
19 and one that Yahoo had already performed in order
20 to gauge the actual cost of the performances under
21 the differentiated rate structure. This
22 calculation yields an effective or blended rate of
23 .065 cents per performance based upon Yahoo's
24 expectation that 90 percent of its transmissions
25 will continue to be radio retransmissions with the

1 remaining ten percent being Internet-only
2 transmissions."

3 A. You read that correctly.

4 Q. Thank you.

5 And you have testified as an expert in
6 previous cases in which you have been asked to
7 apply a willing buyer/willing seller standard to
8 determine royalty rates for intellectual property,
9 correct?

10 A. Well, I've definitely testified in
11 prior cases evaluating intellectual property. I'm
12 not sure it would be fair to characterize it as
13 applying a willing buyer/willing seller standard.

14 MS. HALL: May I please distribute
15 this? Thank you.

16 BY MS. HALL:

17 Q. Professor, do you recognize this as
18 your expert report in the University of Colorado
19 Foundation versus American Cyanamid?

20 A. It certainly looks like it. I'm just
21 curious if I could ask, I thought that part of this
22 was sealed.

23 Q. This part is not sealed. This was
24 obtained on the public docket.

25 A. Thank you.

1 Q. And do you recall testifying in this
2 case that the relevant question when applying a
3 willing buyer/willing seller standard is what the
4 buyer in a negotiation for an intellectual property
5 license would agree to pay and what the seller
6 would agree to accept?

7 A. I may well have said it, but it has
8 been a long time, so I'm sure you will point me out
9 to the language. I don't recall the specific
10 language.

11 Q. Let me ask you to turn to Page 9 of
12 this printout.

13 And two paragraphs above the section
14 that starts: "B, university licensing policy."

15 Do you recall giving the following
16 expert opinion, quote: "The amount that a licensor
17 such as the patentee and the licensee such as the
18 infringer would have agreed upon at the time
19 infringement began, if both had been reasonably and
20 voluntarily trying to reach an agreement, that is,
21 the amount of which a prudent licensee," there's a
22 parenthetical and it continues: "Would have been
23 willing to pay as a royalty and yet be able to make
24 a reasonable profit and which amount would have
25 been acceptable by a prudent patentee who is

1 willing to grant a license. This willing
2 licensor/willing licensee approach comports with
3 the economic concept of an arm's length
4 negotiation."

5 A. So that is what I said. I just want to
6 add for the record in case you don't go there, that
7 my primary responsibility in this case was the
8 determination of measurement of unjust enrichment,
9 and not a royalty rate, so I did comment about the
10 royalty issue in my testimony but that was not the
11 primary focus of my testimony.

12 Q. Do you recall that in commenting on
13 this issue, you adopted the opinion of another
14 expert who had testified in the case?

15 A. No, I don't recall that. I actually
16 disagreed with my -- the expert on my side of the
17 case.

18 Q. Let me ask you to turn to Section E,
19 which is two pages further.

20 JUDGE STRICKLER: Page 11?

21 MS. HALL: Yes. Page 11.

22 BY MS. HALL:

23 Q. And in the second paragraph under
24 Section E, you say of a Mr. Damson, quote:
25 "Whether or not his testimony is admitted, it is

1 the sort of evidence on which economic experts
2 reasonably rely in forming their opinions and I do
3 so in putting forward my damage analysis."

4 JUDGE STRICKLER: I am missing where
5 you are. Page 11?

6 MS. HALL: I'm sorry. Yes, Page 11,
7 the second paragraph under Section E.

8 THE WITNESS: Yeah. So just -- again,
9 just to make the record clear, Mr. Damson did not
10 testify at the trial, I testified. He was a prior
11 expert. I actually had some disagreements with the
12 expert who did the reasonable royalty calculations
13 in the trial you are referring to.

14 BY MS. HALL:

15 Q. You did though rely --

16 A. No, I did cite -- just to help you out.
17 I guess I was citing Mr. Damson's testimony as
18 something I felt uncomfortable relying on, that's
19 correct.

20 MS. HALL: Do you have a copy of that?
21 Thank you.

22 BY MS. HALL:

23 Q. Do you recognize this as the portion of
24 Mr. Damson's testimony to which you referred in
25 your report?

1 A. I don't recognize it. It has been
2 quite a few years, but I am willing to accept your
3 characterization on the reasons we disagree. It
4 has been 20 years, I think, since I testified in
5 this case.

6 So I actually do not recognize it but I
7 do know I looked at Mr. Damson's work so I presume
8 this is what is relevant.

9 Q. Do you recall specifically relying on
10 the opinion by Mr. Damson that in approaching the
11 issue of an appropriate royalty rate in this case,
12 the question is what rate it would have been
13 reasonable to expect in 1981 if negotiations for
14 the rates had been held?

15 A. I just didn't hear you, Counsel.

16 Q. If you want, you can just turn to the
17 language which is the second page, second
18 paragraph.

19 Mr. Damson gives the opinion, quote:
20 "I have approached the issue of an appropriate
21 royalty rate in this case from the following
22 direction: What rate would have been reasonable to
23 expect in 1981 if competitive negotiations for
24 rates in the Colorado patent had been held."

25 A. Sure. I mean, that is consistent with

1 my understanding that in the typical patent case,
2 one is asked to measure damages by what would have
3 happened in a hypothetical negotiation at the time
4 of first infringement.

5 Q. And leaving aside Mr. Damson's
6 testimony, you agree that your testimony in this
7 case was that the relevant question in applying the
8 willing buyer/willing seller standard was the rate
9 to which a willing buyer and willing seller would
10 have agreed, correct?

11 A. Well, it's -- essentially, it's that,
12 but I would just refer back to the paragraph you
13 read into the record previously.

14 Q. The record is what it is.

15 Do you recall testifying in your
16 deposition in this case that looking at post-deal
17 performance cannot tell you what a buyer was
18 willing to pay or a seller was willing to accept
19 for a licensed performance sound recording.

20 A. I may well have said that. I just
21 don't recall it. I'm sure you will remind me. I
22 certainly think it's something I might have said.

23 Q. And just to be clear, you understand
24 that to be the statutory standard here, correct?

25 A. Just to be clear what? Are you saying

1 I believe it's a statutory standard, what a willing
2 buyer and willing seller would be willing to --

3 Q. Agree to?

4 A. -- agree to? Potentially -- yes, I
5 think it's a willing buyer/willing seller standard,
6 yes.

7 Q. Okay, great.

8 JUDGE STRICKLER: Before you go,
9 apropos to this and going back a couple of
10 questions, I think she referenced you to the
11 section of your written rebuttal testimony that
12 includes Paragraph 26 on Page 6.

13 THE WITNESS: Yes.

14 JUDGE STRICKLER: And you make mention
15 of the value or lack thereof of relying on one
16 party's subjective expectations, and then you refer
17 to your analysis of the iHeartMedia-Warner
18 agreement which was based on actual performance,
19 which you say, quote: "I believe is the better
20 approach," close quote.

21 The word "better" is a little ambiguous
22 to me here because it sounds like we are discussing
23 three possible approaches. One is reliance on one
24 party's subjective expectations. The other might
25 be relying on both parties' subjective

1 expectations, the third might be actual
2 performance.

3 Among those three categories or -- how
4 do you rank those from best to worse among those
5 three alternatives?

6 THE WITNESS: Well, worse would be
7 looking at only one side's point of view. With
8 respect to looking -- if you had both sides' point
9 of view versus actual performance, I think that
10 would be something you'd have to think about more
11 deeply. In this particular case, I would feel more
12 comfortable relying on actual performance because I
13 have looked at materials that describe the parties'
14 expectations -- from both sides parties'
15 expectations, and it is very hard from looking at
16 those documents to draw clear inferences about what
17 their willingness to pay and willingness to accept
18 would be.

19 JUDGE STRICKLER: Do I understand your
20 testimony to be then that you don't know whether it
21 is a better approach to look at actual performance
22 or on the other hand, both parties' projections,
23 unless you -- unless clarity of the parties'
24 respective projections is sufficiently clear?

25 THE WITNESS: Essentially, yes. I

1 think you have to decide them on a case-by-case
2 basis, but I would just add further that from my
3 point of view, focusing on the negotiations over a
4 noninteractive agreement itself is questionable
5 because of the problem with the shadow of the
6 statutory license, which makes it difficult to
7 interpret what people are saying about willingness
8 to pay and willingness to accept, so for reasons
9 you've heard many times, I would prefer to focus on
10 the approach I used which is focused on interactive
11 agreements.

12 But just again, to sum up, I actually
13 do not have an absolute view they should always
14 look at performance. I think you have to decide on
15 a case-by-case basis, but I am very troubled with
16 -- about looking at only one side, one side's view.

17 JUDGE STRICKLER: Thank you.

18 BY MS. HALL:

19 Q. Professor Rubinfeld, I want to return
20 to the question I was asking you about comparing
21 actual performance to what the parties would have
22 agreed to.

23 Let me ask you to turn to Tab 2 of your
24 binder, which is SoundExchange Exhibit 192.

25 Do you recognize this as a transcript

1 of your deposition from April 13 and 14 of this
2 year?

3 A. Yes.

4 Q. And let me ask you to turn to Page 859.

5 JUDGE STRICKLER: Is that a transcript
6 page?

7 MS. HALL: It's a transcript page. The
8 transcript page numbers are -- so the bottom label
9 is SX-192-579.

10 THE WITNESS: Okay, I have it.

11 BY MS. HALL:

12 Q. And beginning at Line 22, do you recall
13 being asked the following questions and giving the
14 following answers?

15 Question: "Okay. So your testimony is
16 that Apple agreed to pay for this period of time
17 more than two and a half times the amount of money
18 that it received on a pro rata basis to Warner,
19 correct?"

20 Answer: "No, no, not at all."

21 Question: "In what manner is that
22 incorrect?"

23 Answer: "Well, Apple didn't agree that
24 these would be the final numbers. Apple agreed to
25 reach an agreement which presumably was based on a

1 more optimistic view of its success of its radio
2 service, but to say that Apple agreed that this is
3 how things would end up, I would absolutely
4 disagree with that."

5 A. I do see that, yes.

6 Q. And let me ask you to turn to Page 714
7 of the transcript.

8 MR. POMERANTZ: Objection, Your Honor.
9 This is not proper examination to just read
10 deposition testimony into the record. She can ask
11 a question to the witness and if he says something
12 different, she can then impeach him with or refresh
13 his recollection, but just reading deposition
14 testimony into the record is inappropriate.

15 MS. HALL: Your Honor, I asked Mr.
16 Rubinfeld if he recalled testifying to this. He
17 said he did not, and then I could refresh his
18 recollection.

19 CHIEF JUDGE BARNETT: That is correct.
20 Overruled.

21 MR. POMERANTZ: It's a rather broad
22 question, but okay.

23 BY MS. HALL:

24 Q. Turn to Page 715 of the transcript
25 which is labeled SX-192-435.

1 Beginning at Line 7, do you recall
2 being asked the following question and giving the
3 following answer?

4 Question: "So why would Apple agree in
5 your view to pay .36 for a service that I could
6 have paid under the statutory license only .23
7 for?"

8 Answer: "Well, I'm not" -- then there
9 is a parenthetical and it continues: "I would
10 doubt that Apple would be very happy about paying
11 .3, .36. The .36 result comes from amortizing a
12 fixed fee over a number of actual plays that was --
13 I'm sure from Apple's point of view, disappointing.
14 And Apple -- Apple, I'm pretty sure, had in mind a
15 lot more plays which would have had a lower
16 effective rate."

17 A. I recall.

18 MR. POMERANTZ: Your Honor, objection.
19 If they were going to read into the record, I would
20 ask that the entire answer be read. She left out
21 the portion dealing with the percentage of revenue.

22 CHIEF JUDGE BARNETT: Go ahead, Ms.
23 Hall, read the entire answer, please.

24 MS. HALL: Sure, of course.

25 BY MS. HALL:

1 Q. So the answer, beginning on Line 11
2 was: "Well, I'm not -- first of all, we have to
3 understand that there is also a percentage of
4 revenue problem which complicates this, but I -- I
5 would doubt that Apple would be very happy about
6 paying point .3, .36. The .36 result comes from
7 amortizing a fixed fee over a number of actual
8 plays that was -- I'm sure from Apple's point of
9 view, disappointing."

10 Professor Rubinfeld, you had access to
11 both iHeart and Warner's expectations at the time
12 you entered your written rebuttal report, correct?

13 A. I either had the materials or I could
14 have had access, yes.

15 Q. Do you recall that you cited the
16 Today's Growth Model on which Professor Fischel
17 relies repeatedly in your rebuttal report?

18 A. Yes.

19 Q. And you devote many paragraphs of your
20 report to critiquing those expectations, correct?

21 A. I just -- critiquing --

22 Q. Critiquing those expectations?

23 A. Well, critiquing the implications of
24 that particular model, yes.

25 Q. And you say that Professor Fischel does

1 not adequately explain why he used the Today's
2 Growth scenario, correct?

3 A. That sounds like something I would say,
4 yes.

5 Q. Do you acknowledge, though, that
6 Professor Fischel said that the model was, quote:
7 "Considered the most likely outcome by iHeartMedia
8 and was relied upon by iHeartMedia's board of
9 directors?"

10 A. What I recall actually is that the
11 actual board of directors -- the numbers that the
12 board of directors used I don't think was literally
13 the numbers from that model. It doesn't mean that
14 I didn't say exactly what you said, but I think
15 there was a distinction between that model and what
16 actually appeared in the board of directors deck.

17 Q. Does that appear anywhere in your
18 report?

19 A. Does what I just said?

20 Q. Yes.

21 A. I don't recall whether I said that or
22 not. I would have to go back and look.

23 Q. Do you recall that your stated reasons
24 for failing to credit Professor Fischel's testimony
25 in this issue was, quote: "That neither

1 justification was sufficient," returning to the
2 actual page of your report?

3 A. You are giving me something so out of
4 context, I can't tell whether I did or not.

5 Q. Turn to Paragraph 33 of your report
6 which is Tab 1 and again is SoundExchange Exhibit
7 29.

8 A. Go ahead.

9 Q. Do you see in Paragraph 33, you say:
10 "Professors Fischel and Lichtman do not adequately
11 explain why they determined that only one of these
12 six scenarios was considered," beginning at the top
13 of the next page, quote: "They state that they
14 focused on these projections because they were
15 'considered the most likely outcome' by iHeartMedia
16 and were 'relied upon by iHeartMedia's board of
17 directors.' Neither justification is compelling."

18 A. That's what I said, yes.

19 Q. So your reason for failing to credit
20 their testimony has nothing to do with your
21 assertion here today that you believe there is a
22 difference between the numbers that they relied
23 upon and the numbers in the growth model, correct?

24 A. I don't think there is anything I have
25 said today that is based on that point. I think

1 that is correct.

2 I mean, I was just trying to check to
3 see whether my memory was correct that there was
4 some distinction between that model and what the
5 board actually relied on.

6 Q. Please do.

7 A. Just give me just a second.

8 But I don't think -- maybe it doesn't
9 matter because I don't think that affects the
10 conclusion -- the answers I gave to the prior
11 questions, so...

12 Q. Okay. So I'm happy with that answer.

13 Are you aware of the fact that an
14 iHeart fact witness in this proceeding has given
15 sworn testimony that the Today's Growth Model on
16 which Professor Fischel relied on was the version
17 that the board relied upon?

18 A. I have not seen or read any of the
19 actual fact witness testimony, so the only thing I
20 could recall would be written submissions.

21 Q. I am talking about a written
22 submission.

23 A. I don't recall specific testimony. I
24 just recall the characterization of this particular
25 model by Professor Fischel and he described it as,

1 considered the most likely outcome, but I don't
2 recall specific fact witness testimony. You would
3 have to show that to me.

4 Q. Were you given access to and did you
5 review the written testimony of Steven Cutler in
6 this proceeding?

7 A. Yes.

8 Q. You did, okay. Let me ask you then to
9 turn to Tab 4 of your binder, which is iHeartMedia
10 Exhibit 3346.

11 I will represent to you, subject to
12 verification or objection by your counsel, that
13 this is Exhibit DD to Mr. Cutler's written
14 testimony.

15 I will ask you to turn to Page 9 of 13.

16 A. Okay.

17 Q. Do you see that this is the Today's
18 Growth case on which Professor Fischel relied?

19 A. Yeah, but I see the no growth case and
20 promoted growth case on other pages, so it is a
21 little hard to tell. I can't tell which one he is
22 relying on from what I have in the document.

23 Q. Okay. I take it that you were not
24 given access to and did not review Mr. Cutler's
25 deposition testimony on that topic?

1 A. I was given access to all the
2 deposition testimony. I just don't -- I didn't
3 read all the depositions, but -- and I don't recall
4 -- I just don't recall what Mr. Cutler said about
5 this particular issue but I certainly would have
6 had access to all this material.

7 Q. Let me ask you to assume, subject to
8 later testimony, that Mr. Cutler did testify that
9 this is the case on which the board relied.

10 Are you aware of any other evidence in
11 this case that would contradict that assertion?

12 A. So you are asking me, do I -- can I
13 cite you any evidence that the board relied on one
14 of the other five or six models?

15 Q. Do you have any reason to doubt the
16 sworn testimony of a fact witness as to what the
17 board relied upon?

18 A. Now you are asking me a different
19 question.

20 Q. Answer that question.

21 A. No, I would generally assume that the
22 witnesses -- all witnesses are giving honest
23 testimony.

24 Q. You also had access to Warner's
25 projections at the time you filed your written

1 rebuttal testimony, correct?

2 A. Yes.

3 Q. And in your report, you rely on, among
4 other things, the written testimony of Mr. Wilcox
5 as to Warner's assumptions going into the
6 agreement, correct?

7 A. Yes.

8 Q. And I assume that you reviewed Mr.
9 Wilcox's testimony prior to including that in your
10 report?

11 A. Yes.

12 Q. So you are aware that Mr. Wilcox
13 attaches several models to his testimony including
14 one that he says illustrates Warner's projections?

15 MR. POMERANTZ: Your Honor, if we could
16 just have some clarification here. Mr. Wilcox
17 submitted direct testimony and rebuttal testimony
18 on the iHeart-Warner deal, and I think what Ms.
19 Hall is asking about is Mr. -- Dr. Rubinfeld's
20 rebuttal testimony, and I want to make clear which
21 testimony Ms. Hall is referring to.

22 MS. HALL: Thank you.

23 BY MS. HALL:

24 Q. I am referring to Mr. Wilcox's rebuttal
25 testimony.

1 A. Your question is did I see that
2 testimony? Is that your question?

3 Q. Yes.

4 A. Yes.

5 Q. And you cited it in your report,
6 correct?

7 A. Yes.

8 Q. And you understand that Mr. Wilcox
9 attached to that testimony a number of models
10 including one that he said illustrated Warner's
11 projections for the agreement, correct?

12 A. I believe that's correct, yes.

13 Q. You also cite a Warner deck which you
14 described as a board presentation as evidence of
15 what Warner believed going into the deal, correct?

16 A. Yes.

17 Q. In your written testimony, however, you
18 did not make any attempt to analyze iHeart and
19 Warner's expectations to derive a rate based on
20 those expectations, correct?

21 A. That's right. I didn't think that
22 looking at the expectations of a single,
23 individual, noninteractive deal would be the most
24 informative way to approach the issue, the primary
25 issues in this case.

1 MS. HALL: Your Honor, I now need to
2 get into restricted information, so I'd ask that we
3 close the courtroom.

4 CHIEF JUDGE BARNETT: At this time, we
5 will close the hearing room to anyone who has not
6 signed a nondisclosure certificate in this
7 proceeding.

8 (THIS ENDS PUBLIC SESSION)

9 (RESTRICTED SESSION BOUND SEPARATELY)

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1 (THIS BEGINS PUBLIC SESSION)

2 CHIEF JUDGE BARNETT: Mr. Joseph?

3 MR. JOSEPH: Thank you, Your Honor.

4 Given the hour, I will endeavor to be
5 brief, but I can't promise you five minutes right
6 now.

7 CHIEF JUDGE BARNETT: It's the thought
8 that counts at this point, Mr. Joseph. Thank you.

9 CROSS-EXAMINATION BY COUNSEL FOR NAB

10 BY MR. JOSEPH:

11 Q. Good afternoon, Professor Rubinfeld.

12 A. Good afternoon.

13 Q. As you know, I'm Bruce Joseph,
14 representing NAB.

15 A. I do. I believe we have had a chance
16 to speak many times.

17 Q. Pleasure to see you again.

18 CHIEF JUDGE BARNETT: Mr. Joseph, is
19 this a closed session?

20 MR. JOSEPH: Oh, no, I'm sorry, Your
21 Honor, it is, I believe, absolutely open.

22 CHIEF JUDGE BARNETT: Wonderful. Then
23 let's open the doors.

24 MR. JOSEPH: And I would be delighted
25 to have the reporter have them on the open record.

1 BY MR. JOSEPH:

2 Q. Professor Rubinfeld, let's start. In a
3 real world, do firms often bargain with imperfect
4 information?

5 A. They do.

6 Q. And the lack of perfect information can
7 lead to firms failing to reach what might otherwise
8 have been a mutually beneficial agreement, right?

9 A. That is certainly a possibility, yes.

10 Q. And you are familiar with the term
11 monopoly power, aren't you?

12 A. Yes.

13 Q. And you would say that a firm has
14 monopoly power if it has the ability to raise price
15 substantially above a competitive level and sustain
16 that supracompetitive price for a substantial
17 period of time, correct?

18 A. I not only would say that I believe I
19 have said that.

20 Q. Indeed, you have.

21 Do firms with monopoly power ever
22 bargain with their customers?

23 A. Yes.

24 Q. Do firms with monopoly power ever make
25 concessions or change their bargaining position in

1 response to positions taken by buyers with which
2 they are dealing?

3 A. Yes.

4 Q. Now, Professor Rubinfeld, in your
5 response to the critique of your assumption about
6 the price royalty ratios of interactive and
7 noninteractive services this morning, I believe you
8 said, and let me know if I have got it wrong, that
9 the downstream elasticities of demand were
10 relatively similar for both interactive and
11 noninteractive services. Is that about right?

12 A. Yes.

13 Q. Did you perform any analysis to
14 quantify the downstream elasticity of demand for
15 interactive services?

16 A. I have not calculated an actual
17 elasticity.

18 Q. Did you perform any analysis to
19 quantify the downstream elasticity of demand for
20 noninteractive services?

21 A. I have not. By that you mean an actual
22 calculation, no, I have not done an actual
23 calculation.

24 Q. Now I believe and again, correct me if
25 I am wrong, that you referred to the Lerner

1 condition and said that it says that the markup of
2 -- let me try again.

3 It says that the markup of price over
4 cost is the inverse of the elasticity of demand for
5 a particular product. Is that about what you said?

6 A. I may well have said that. The Lerner
7 condition is usually done as a markup as a
8 percentage of price, as being equal to one over the
9 elasticity of demand.

10 Q. Now in that statement, you are
11 referring to the elasticity of demand, the upstream
12 elasticity of demand meaning the demand of the
13 service for the license or the downstream
14 elasticity of demand referring to the demand of
15 individuals for the service?

16 A. In the testimony I give today, I was
17 talking about the downstream elasticity.

18 Q. Just so the record is complete, did you
19 perform any analysis to quantify the upstream
20 elasticity of demand for sound recording
21 performance licenses by interactive services?

22 A. Nothing quantitative.

23 Q. Did you perform any analysis to
24 quantify the upstream elasticity of demand for
25 sound recording performance licenses by

1 noninteractive services?

2 A. Again, no quantitative estimate of the
3 elasticity.

4 Q. Now let me ask you to turn to Paragraph
5 110 of your written direct testimony which -- and I
6 am using it for convenience, because it has
7 everything I need, the Weil Gotshal
8 cross-examination binder which is the one you were
9 given by Mr. Rich.

10 It is Exhibit SX 17, the first tab.

11 Let me ask you to turn to Paragraph 110.

12 A. I have it.

13 Q. Now in that paragraph, you said, I
14 believe, that the services' elasticities of demand
15 reflect the preferences of their listeners and that
16 the differences in price elasticities will reflect
17 differences in the technical features of the
18 services, as well as their business models. Was
19 that -- that is what you said, correct?

20 A. Yes.

21 Q. By technical features, you meant, among
22 other things, differences among custom radio,
23 simulcasting and on-demand services, right?

24 A. That would have included -- I think
25 when I talked about technical features, I was

1 probably focusing on algorithms, but I think my
2 comment would be broader than that.

3 Q. And it would include differences, for
4 example, between on-demand services and custom
5 radio services?

6 A. Yes, I think it would.

7 Q. And by business models, you were
8 referring, among other things, to services with an
9 emphasis on the subscription model and services
10 with an emphasis on the ad-supported model, weren't
11 you?

12 A. Yes.

13 Q. Now I believe you also said in
14 discussing the ratio issue this morning with
15 Mr. Pomerantz, that all of the inputs, other than
16 recorded music for interactive and noninteractive
17 services, are relatively modest in terms of
18 variable costs. Is that roughly what you said?

19 A. Yes.

20 Q. Did you perform any analysis to
21 quantify the variable costs of all of the inputs to
22 an interactive service other than the recorded
23 music?

24 A. I didn't do any specific calculation.
25 Again, in some -- in the process I have seen, I

1 think, some P&L statements that gave me an idea
2 what the costs were like but I didn't do any
3 specific calculation.

4 Q. Same question with respect to
5 noninteractive services.

6 A. My answer would be the same.

7 Q. By the way, isn't it true that revenues
8 underlie a service's elasticity of demand only if
9 the demand elasticity is driven by the possibility
10 of shutdown?

11 A. Your question is not at all clear to
12 me. Can you try again?

13 Q. I will withdraw it because I'm not sure
14 that it is entirely clear to me either.

15 If Professor Katz were here --

16 A. I was going to say if it goes to
17 Professor Katz, we can ask him. I will talk to him
18 about this when I see him back in our normal jobs.

19 Q. Let me ask you to turn to Paragraph 226
20 of your written rebuttal testimony.

21 That is the second tab, excuse me, in
22 the binder.

23 A. 226?

24 Q. 226.

25 A. Okay. I have it.

1 Q. And starting about the -- the final
2 offer that was on the table was unreasonable, you
3 have a sentence that says, among other things, the
4 NAB could have adopted -- excuse me, could have
5 opted to approach the individual labels and
6 negotiate direct deals.

7 Do you see that? Happy to read the
8 whole thing, but it is already in the record.

9 A. I see that.

10 Q. Can you name a single direct deal
11 between a record label and the simulcaster that had
12 been negotiated as of February 15, 2009?

13 A. I can -- certainly can name one, but it
14 is not something I studied.

15 Q. Does the date February 15, 2009 mean
16 anything to you?

17 A. That is very close to the date at which
18 the prior web agreement went into place.

19 Q. Can you name a single direct deal?

20 A. Web III.

21 Q. Which one?

22 A. Sorry, I was referring to Web III.

23 Q. Can you name a single direct deal
24 between a record label and a Webcaster offering
25 only statutory streaming services that had been

1 negotiated as of February 15, 2009?

2 A. No, but it's not something I have
3 specifically studied.

4 MR. JOSEPH: I have no further
5 questions, Your Honor.

6 CHIEF JUDGE BARNETT: Thank you.

7 Mr. Malone has left us. Mr. Cunniff?

8 MR. CUNNIFF: I have no questions, Your
9 Honor.

10 CHIEF JUDGE BARNETT: Okay. Redirect,
11 Mr. Pomerantz.

12 MR. POMERANTZ: Thank you.

13 Your Honor, we have four witnesses who
14 need to testify and get off by the end of the day
15 tomorrow, so I'm going to try to be extremely brief
16 and only follow up with one question, frankly
17 because I didn't understand what Professor
18 Rubinfeld and Judge Strickler were talking about,
19 and they have economics degrees, and I don't.

20 REDIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

21 BY MR. POMERANTZ:

22 Q. So let me ask this question: You both
23 seem to be thinking that the higher the percentage
24 of revenue, the less likely it would be binding,
25 and I don't get that.

1 So could you explain to me why -- if
2 somebody said that if you have a 99 percent revenue
3 share, that it would be less likely to be binding
4 than if it was a one percent revenue share?

5 That is, if you share one percent of
6 the revenue versus 99, you decide whether it's
7 greater than the per-play rate, is it more likely
8 that it's going to be greater than the per-play
9 rate if it's at, let's say, 55 percent than 25
10 percent?

11 MR. HANSEN: That's a leading question
12 if I ever heard one.

13 CHIEF JUDGE BARNETT: I'm going to
14 allow it just to get it done.

15 MR. POMERANTZ: Thank you, Your Honor.

16 THE WITNESS: Well, I mean, it is not
17 obvious which way it would turn out. It would
18 depend on the particular circumstances.

19 MR. POMERANTZ: We will save that one
20 for the briefing. I have no further questions,
21 Your Honor.

22 CHIEF JUDGE BARNETT: Thank you.

23 Judge Strickler?

24 JUDGE STRICKLER: No.

25 CHIEF JUDGE BARNETT: Judge Feder?

1 JUDGE FEDER: No.

2 CHIEF JUDGE BARNETT: Professor
3 Rubinstein, Rubinfeld, pardon me. Professor
4 Rubinfeld, you may be excused. Thank you.

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 MR. POMERANTZ: Your Honor, let me -- a
8 couple of things. We have six witnesses that we
9 have -- at least all of us have agreed that we
10 would propose that you take in writing without any
11 further examination by any party. There are three
12 witnesses on our side and I believe the other three
13 are all NAB proposed witnesses, and the names are
14 -- from our end, it would be Ms. Roberts, Mr.
15 Foster, and Professor Rysman, R-Y-S-M-A-N. For
16 NAB, it's Ms. Koehn, I believe it's K-O-E-H-N.

17 MR. JOSEPH: I just learned Rysman.

18 JUDGE STRICKLER: Okay, K-O-E-H-N?

19 MR. POMERANTZ: K-O-E-H-N. Mr. Chiang,
20 C-H-I-A-N-G, and Mr. Gadhoury.

21 JUDGE STRICKLER: Gadhoury?

22 MR. POMERANTZ: G-A-D --

23 MR. RICH: H-O-U-R-Y.

24 MR. POMERANTZ: We have Mr. Barros here
25 and our request, if possible, I think our direct

1 will be very short, is to do our best, if we can
2 get him on and off so he can leave. I think they
3 have about a 30 minute -- they get to have a
4 30-minute cross, so we would hope to try to get him
5 on and off today.

6 CHIEF JUDGE BARNETT: Let's go for it.

7 MR. POMERANTZ: Thank you. One other.
8 We had discussed -- we had previously mentioned
9 that we think we will be able to also have Mr.
10 Westergren to submit on the papers as well. We are
11 working on a stipulation and we would expect to be
12 providing that to you shortly.

13 CHIEF JUDGE BARNETT: Thank you.

14 GLEN BARROS, being first duly sworn, to tell the
15 truth, the whole truth and nothing but the truth,
16 testified as follows:

17 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE

18 BY MS. LEMOINE:

19 Q. Good afternoon, Mr. Barros.

20 A. Good afternoon.

21 MS. LEMOINE: Good afternoon, Your
22 Honors.

23 BY MS. LEMOINE:

24 Q. Could you please state your name for
25 the record.

1 A. Glen Barros.

2 Q. Could you spell your first and last
3 name for the Court?

4 A. G-L-E-N B-A-R-R-O-S.

5 Q. And where do you work, sir?

6 A. Concord Music Group.

7 Q. And what is your title there?

8 A. President and CEO.

9 Q. What are your job responsibilities as
10 president and CEO of Concord Music Group?

11 A. To guide the overall strategy of the
12 business for our stakeholder's benefit, to oversee
13 operations and all things related to that.

14 CHIEF JUDGE BARNETT: Mr. Barros, if
15 you could move that microphone closer, more
16 centrally in front of you. That would be great.
17 Thanks.

18 BY MS. LEMOINE:

19 Q. Mr. Barros, I'm going to ask you to
20 open your binder. You see there is a document
21 there behind Tab 1.

22 It is a document that SoundExchange has
23 marked as SX 001.

24 Do you recognize that document?

25 A. I do. It is my written rebuttal

1 testimony.

2 Q. If you flip to the back page, the last
3 page, is that your signature, sir?

4 A. It is, indeed.

5 Q. Is this testimony true and correct?

6 A. Yes, it is.

7 MS. LEMOINE: Your Honor, at this time,
8 we would offer SoundExchange 001.

9 MS. POPE: No objection.

10 CHIEF JUDGE BARNETT: It is admitted.

11 (SoundExchange Exhibit No. 001 was
12 admitted into evidence.)

13 MS. LEMOINE: Mr. Nichols, if you could
14 put up Slide 1, please.

15 BY MS. LEMOINE:

16 Q. Mr. Barros, does this slide, this
17 slide, describe the subject matter you cover in
18 your testimony?

19 A. Yes, it does.

20 Q. We're going to focus on primarily on
21 some subset of this today.

22 But first, could you just briefly tell
23 the judges a little bit about Concord Music Group.

24 A. Sure. Concord Music Group is an
25 independent label and music publisher. We started

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1 in 1973, primarily as a traditional jazz label, but
2 over the past 20 years, we have grown quite
3 substantially and diversified in many ways. We now
4 have a very vast catalog of recordings, which we
5 have amassed via acquisition and by development,
6 that amounts to about 10,000 active albums.

7 We also have four active label groups
8 which create music regularly and release more than
9 a hundred new records per year in new recordings.
10 Those label groups are in various genres. We are
11 still the leader in jazz. We have a very strong
12 presence in jazz, blues and related genres. We
13 have a presence in bluegrass and Americana through
14 our Rounder labels, and we have a presence in rock
15 now, which is a recent acquisition and also in pop
16 rock or singer songwriter. We work with a number
17 of legendary artists, the like of which are Paul
18 McCartney, James Taylor, Paul Simon, artists like
19 that.

20 So overall, it is diversified both in
21 the type of rights that we have and the types of
22 music in which we operate.

23 Q. How would you say that Concord is
24 different from other indie labels?

25 A. The indie world is very diverse in and

1 of itself, but I'd say one thing that we differ
2 from most indie labels is the size of our catalog,
3 relative to our new releases. A lot of indies are
4 newer companies that focus more on their new
5 releases.

6 We have amassed a very substantial
7 catalog. In one case or one difference that we
8 have is that our catalog also tends to be much
9 older, so we have master recordings that predate
10 even the beginning of Concord. They go all the way
11 back 50, 60 years or more, so we have a lot of
12 recordings in catalog, in general but also in
13 pre-1972 recordings, which of course are different
14 based on the difference in the economy.

15 Q. Right. Are you familiar with Concord's
16 agreement with iHeartMedia?

17 A. I am.

18 Q. Did you have a role in the negotiation
19 of that agreement?

20 A. I did.

21 Q. So if you could flip to Tab 2 of your
22 binder.

23 It is a document we've marked as SX
24 110.

25 Do you recognize that document?

1 A. I do. That is our agreement with
2 iHeartMedia.

3 MS. LEMOINE: Your Honors, at this
4 time, we provisionally seek to admit SX 110 subject
5 to our earlier prefile filings.

6 MS. POPE: We have no objection. The
7 document is already in evidence as iHeartMedia
8 3365.

9 MS. LEMOINE: Okay. Thank you.

10 CHIEF JUDGE BARNETT: 3365?

11 MS. POPE: I have it as 3365.

12 CHIEF JUDGE BARNETT: There had not
13 better be anyone else with 3365. That was my one
14 rule. 3365.

15 MS. LEMOINE: I think we managed to
16 follow that one.

17 CHIEF JUDGE BARNETT: Having been
18 admitted, we will allow, in this portion of the
19 testimony, reference to that document as
20 SoundExchange 110, which is exactly the same
21 document.

22 (SoundExchange Exhibit No. 110 was
23 admitted into evidence.)

24 MS. LEMOINE: Thank you, Your Honor.

25 BY MS. LEMOINE:

1 Q. Could you please describe for us how
2 the negotiation of that agreement began?

3 A. It began --

4 Q. I'm so sorry to interrupt you. I think
5 at this time we should probably go into restricted
6 session.

7 CHIEF JUDGE BARNETT: Okay. Anyone in
8 the hearing room who has not signed the appropriate
9 documentation, please wait.

10 (THIS ENDS PUBLIC SESSION)

11 (RESTRICTED SESSION BOUND SEPARATELY)

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1 CERTIFICATE OF COURT REPORTER

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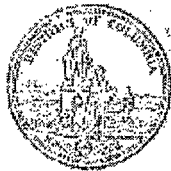
3 I, Bonnie L. Russo, do hereby certify that the
4 foregoing transcript is a true record of the
5 proceedings to the best of my ability, that I am
6 not related to or employed by any of the parties
7 involved in these proceedings, and, further, that I
8 am not a relative or employee of any attorney or
9 counsel employed by the parties hereto, or
10 financially interested in the proceedings.

11

12

13 *Bonnie L. Russo* Notary Public

14



15

My Commission Expires:

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May 16, 2016

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